UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 12, 1997

IRON WORKERS LOCAL 455, et al.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 95B00165
LAKE CONSTRUCTION & DEVELOPMENT	)	
CORPORATION	)	Ellen K. Thomas
Respondent.	)	Administrative Law Judge

FINAL DECISION AND ORDER

Appearances: Catherine K. Ruckelshaus, Esq. and Joaquin Amaya, Esq. for Complainants
Edward Gasthalter, Esq. for Respondent

INTRODUCTION

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (1994) (INA) in which Iron Workers Local 455 and seven of its members alleged that Lake Construction & Development Corporation (Lake or respondent) engaged in citizenship status discrimination by failing to hire or even to consider the applications of Leonard Anderson, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarrusso, Tea Graham,[1] and Kenneth Mansmann for an advertised position as an ornamental iron worker by preferring to employ an undocumented alien instead, and by maintaining an unjustified requirement that the worker sought speak Spanish or Portuguese.

[1] Tea Graham was granted leave to withdraw from this action on February 19, 1997.

Lake denied the material allegations of the complaint and alleged as an affirmative defense that it had no legitimate need to hire any ornamental iron workers.

I. THE PARTIES

A. Local 455 and its Members

Local 455 is a labor union which represents iron workers and maintains a hiring hall where employers may call looking for workers. (Tr.505).[2] Its Financial Secretary/Treasurer is Anthony Rosaci. Its members work in a variety of occupations and are broadly classified as apprentices, laborers, mechanics, finishers or layout men, and foremen. Each category encompasses other titles as well; mechanic, for example, is a broad category which includes welders, metal fabricators, and drivers. (Tr.507-08). Laborers may be either experienced or inexperienced. (Tr.508). The range of work includes both inside and outside work, and may involve the use of many different kinds of metal, for example, brass, bronze, aluminum, steel, and cast iron. (Tr.510). Specific jobs could range from such delicate work as making a metal flower to putting holes in the end of a beam so that it can be connected to help form the structure of a building. (Tr.33). They could also include making gates and railings, framing buildings, working on bridges or oil tanks as well as shop fabrication of special items. (Tr.510).

The individual complainants in this case are among the men who literally built New York. The fruits of their labor are to be found undergirding the city's subway system and bridges, in its hotel and college buildings, in its sewage treatment plants and housing projects, at the Metropolitan Museum, the Statue of Liberty, Ellis Island, and Madison Square Garden, in the Brooklyn Bridge and at the Javits Center, at the Bank of Chicago, the World Trade Center, the Trump Tower, and in numerous other buildings and bridges in and around the metropolitan area.
They come from a variety of different backgrounds including the United States, Italy, Spain, and Jamaica. Each is either a native-born or a naturalized United States citizen, and each has from twenty to thirty-six years of experience in the iron work trades. Among them they have skills in both ornamental and structural iron work, including specific skills as welders, mechanics, finishers, fabricators, and layout men.

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[2] The following abbreviations will be used throughout this decision:

Tr. - Transcript of hearing testimony
CX - Complainants' Exhibit
RX - Respondent's Exhibit
CRFA1 - Complainant's First Requests for Admission
RCRFA1 - Responses to CRFA1
CRFA2 - Complainant's Second Requests for Admission
RCRFA2 - Responses to CRFA2
CFI - Complainant's First Interrogatories
RCFI - Responses to CFI
CRFP1 - Complainant's First Request for Production of Documents
RCRFP1 - Responses to CRFP1

Leonard Anderson was born in Jamaica and trained in England. (Tr.151-52). He has been in the United States since 1963 and has been a citizen for approximately 15 years. (Tr.151). He has almost 40 years of experience in iron work trades and holds both city and state licenses. (Tr.154). Louis Borkowski is a United States citizen and also has 40 years of experience in iron work including non-union jobs as well. (Tr.120). He has worked on the Williamsburg Bridge, on the elevated structures for the MTM and on the World Trade Center. (Tr.109, 114). He has been a member of Local 455 for twenty-two years. (Tr.109). Born in Spain, Isidro Barreiro has been in the United States for twenty-five years and is a United States citizen. (Tr.453). He was trained in France and has worked in Italy, Spain, Australia, and the United States. (Tr.455). He has worked on the opera house in Sydney, on the doors at the Metropolitan Museum, and on the brass railings at Macy's. He is licensed as a first class welder by the city and state of New York and is certified by the fire department to handle gas and oxygen. (Tr.456). He is fluent in English, Portuguese, French, Italian, and Spanish. (Tr.457-58). He too has worked in both union and non-union jobs. (Tr.461). Andrew DeSimone is a United States citizen (Tr.130), and has 30 years of iron work experience. (Tr.131). He has done iron work on housing projects, at Madison Square Garden, the Trade Center, the Bank of Chicago, and in Merv Griffin's apartment. (Tr.131). He has worked non-union jobs as well (Tr.139), and in positions ranging from mechanic to finisher to assistant foreman and supervisor of a plant. (Tr.134). Guy Giarrusso was born in Italy. He has been in the United States since 1969 and has been a citizen since 1983. (Tr.49). He was trained in Italy (Tr.50), and has worked welding aluminum, brass, stainless steel, tin, and zinc. (Tr.51). He has been a member of Local 455 for about six years and has 30 years of experience. (Tr.51). Kenneth Mansmann is a United States citizen with 24 years of experience in the iron work trades, and has worked on the Williamsburg Bridge, the Manhattan Bridge, the Brooklyn Bridge, the Statue of Liberty, Ellis Island, and on numerous sewage treatment plants (Tr.32), burning, cutting, and shaping metal. (Tr.33). He is currently a high school teacher (Tr.31), but was formerly a welder certified both by the city and the state. (Tr.34).

B. Lake Construction, its officers and employees

Lake Construction is a corporation engaged in general contracting and construction work on both public and private projects, and has its principal place of business at 150 King Street, Brooklyn, N.Y., 11231. George Lucey, its President, has owned and managed construction corporations since 1962 and has worked both in historic restoration and in the renovation of concrete structures. (CX10G).[3]

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[3] CX10 as copied from Lake's original business brochure contains duplications of some pages, while other pages are missing entirely. The sequence of pages in the copy also differs from that in the original. In the interest of clarification, the unnumbered pages in the exhibit are identified by their captions in the order in which they appear in the original document as: CX10A, front cover with the title "Lake Makes Your Vision Reality"; CX10B, inside cover with title "In the Complex and Extraordinary"; CX10C, captioned "On Time and on the Money"; CX10D, captioned "Renewing a Safe Footing"; CX10E, captioned "In Substantial Restructuring"; CX10F, captioned "Surfacing the Urban Environment"; CX10G, half-page insert captioned "The Principals"; CX10H, half-page insert

(continued...)

Manuel Tobio, Vice President, is himself a licensed welder and an expert in heavy steel and concrete construction. He has supervised major projects from Maine to Texas. His projects in New York City include work on the East Side Drive, the Manhattan Bridge, the Verranzano Bridge, and the construction of a complex steel and lattice fence and gazebo in the New York Botanical Gardens. (CX10G). Manuel P. Tobio, Treasurer and Secretary, specializes in heavy-duty construction involving steel, concrete and formwork. He is an expert in bridge repair and has supervised steel and concrete work on the Sunshine Skyway Bridge in St. Petersburg, Florida, and the Whitestone and Triborough Bridges in New York City. He has managed major bridge repair and rehabilitation projects for private companies, for the state of New York and for the United States government as well as for the city of New York. (CX10G). George Lucey, Manuel Tobio, and Manuel P. Tobio are the owners of Lake Construction and are also partners and officers in the LCD Partnership (Tr.315), as well as being officers of Saratoga Leasing (Tr.315), and G.F. Lucey & Associates which is owned by their children. (Tr.313). Other principals of the company include Alex Tager, P.E., Vice President, an engineer and member of the American Societies of Civil Engineering and Steel Construction; and Vincent Meli, Comptroller and Vice President, who supervises the accounting staff and is responsible for financial duties. (CX10G).

Lake has a complete steel fabricating shop as well as a sheet metal shop, and owns a variety of tools and equipment. (CX10J). The regular office staff consists of three persons: Carmen Montalvo, secretary; Vincent Meli, comptroller; and Carl Tortorella,[4] a bookkeeper who assists the comptroller. (Tr.388-89). George Lucey himself is sometimes in the office as well. (Tr.389).

Jose Manuel Perez Hermo, an undocumented worker, is a licensed welder employed by Lake who came to the United States from Spain in 1988 on a tourist visa which was valid for 6 months. (Tr.654-55). He had worked in Spain as a welder, cutter, designer, and assembler of ornamental iron and aluminum for housing, windows, and handrails. (Tr.652). Since the expiration of his tourist visa,

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[3](...continued)
captioned " Project History"; CX10I, half page insert continuing " Project History"; CX10J, half-page insert captioned " Project Equipment List"; CX10K, captioned "Creating an Oasis for Quality Living"; CX10L, captioned "Enhancing Our Country's Proud Heritage" ; CX10M, captioned "Entrusting Parks for Young and Old"; CX10N, captioned "In the Complex and Extraordinary" (although the title is the same as that on the inside cover (CX10B), both the text and the pictures are different); CX10O, captioned "Creating Peaceful Outdoor Environments," one of four loose page inserts in the pocket of the back cover; CX10P, captioned "Creating New Faces for Old Friends", second of four loose page inserts in the pocket of the back cover; CX10Q, captioned "Repairing Concrete Surfaces to Last and Last" third of four loose page inserts in the pocket of the back cover; CX10R, captioned "Recreating Sound Structures for Urban Parking" fourth of four loose page inserts in the pocket of the back cover; CX10S, pocket overlay approximately 1/4 page inside of back cover showing Lake's principals inspecting work in the welding shop; and CX10T, back cover.

[4] Tortorella was identified by one of the witnesses as Tortole. (Tr.239, 241).

Hermo has been unlawfully present in the United States. (RCRFA2 Nos. 53, 55, 64, 54, 66, Tr.644). Shortly after coming to this country he was hired at the Brooklyn Navy Yard as a welder, and he continued to work there as a welder until he was laid off in 1990. (Tr.627, 633). His next job after this layoff was as a welder for Lake Construction where his initial assignment was in the welding shop doing restoration of the cast iron fencing for Stuyvesant Square Park. (Tr.242, 296, 317, 408). He is still employed at Lake.

II. PROCEDURAL HISTORY

On May 11, 1995 Iron Workers Local Union No. 455, through its Financial Secretary-Treasurer, Anthony Rosaci, filed seven charges with the Special Counsel for Immigration-Related Unfair Employment Practices on behalf of its members Leonard Anderson, Louis Borkowski, Andrew DeSimone, Guy Giarrusso, Tea Graham, Kenneth Mansmann, and Isidro Barreiro. Each of the individual complainants alleged that Lake discriminated against him on the basis of his citizenship by failing to hire him. Six complainants also charged that Lake maintained a discriminatory foreign language requirement. Barreiro's charge alleged that he met the language requirement and was not told the reason for his rejection. The charges were collectively assigned the Charge Number 52-117. On September 19, 1995, the union received a letter from Special Counsel authorizing the filing of a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days thereafter; the complaint was filed on December 15, 1995. All jurisdictional requirements have been satisfied.

An answer was initially filed on March 1, 1996 and subsequently amended on May 13, 1996. The amended answer denied the material allegations of the complaint and asserted as an affirmative defense that:

> Upon information and belief, Lake's determination not to employ the complainants was not predicated upon discriminatory conduct, but rather because there was no proper labor need or economic justification to hire the complainants, or any of them, as employees.

Discovery was problematic throughout. On November 7, 1996, Local 455 filed a Motion for Summary Decision on the issue of liability only. Both parties filed documentary evidence and/or affidavits. Disputes about the meaning of documents and conflicts between respondent's position and much of the documentary evidence raised a genuine issue of material fact, so that summary decision was inappropriate.

Both parties filed prehearing statements. Complainants' prehearing statement alleged that the union received notice of a job announcement seeking an ornamental iron worker. That announcement was made as a result of a petition to the Department of Labor initiated by Manuel Tobio, Vice President of Lake, to obtain work authorization for Jose Hermo, the undocumented alien who had been working illegally for the company. Six members of Local 455, all of them qualified applicants, were initially referred to Lake by the union. Thereafter, the union was contacted on behalf of Lake by Dulce Cuco,

a paralegal, and was told that the job required the worker to speak Spanish or Portuguese. The union referred two more applicants who met that requirement. Dulce Cuco called again and scheduled interviews for those two to be held with a company representative. Although the two applicants appeared for the interview, the company representative did not show up. Cuco said there had been an accident and the interviews would be rescheduled. The applicants heard nothing further about the job. Complainants believe the foreign language requirement to be an unlawful screening device.

Lake's prehearing statement alleged that Jose Hermo, the undocumented worker, was originally hired to do welding but that within a few months he had become a laborer doing unskilled work. On public jobs Lake claimed it contracted out the iron work jobs to union iron contractors. Lake's work on private jobs is essentially limited to concrete and there is no regular need for iron workers. Manuel Tobio signed the application for labor certification as a favor to the employee but he did not prepare the application himself, nor did he authorize the newspaper ad with the foreign language requirement. Many of the documents submitted in furtherance of the application were forgeries. Lake did not hire or pay Dulce Cuco, did not authorize any interviews, and is not responsible for her actions. Tobio's signing of the application may, according to Lake, confer a right to remedy on the Department of Labor, but creates no cause of action for the complainants.

An evidentiary hearing was conducted in New York, New York on March 10, 11, and 12, 1997. Testimony was heard from Anthony Rosaci, Leonard Anderson, Edson Barbosa, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarusso, Kenneth Mansmann, Vincent Meli, Manuel Tobio, George Lucey, and Jose Hermo. Received in evidence were Complainant's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, and 20 and Respondent's Exhibits 1, 2, 3, 4, 6, 7(a) through 7(e), 9, and 10. A record of 683 pages (exclusive of the exhibits) was compiled, the transcript of which was received on April 10, 1997, and which was followed on April 23, 1997 by a Schedule for Post Hearing Submissions. On June 5, 1997, complainant filed proposed findings of fact and conclusions of law and its post hearing brief; on July 15, 1997, Lake filed its proposed findings of fact and conclusions of law and post hearing brief. On August 4, 1997 complainants filed a reply brief and the record was closed.

III. THE STATUTORY AND REGULATORY BACKGROUND

The events complained of took place against a complex mosaic of legislation and regulation governing the hiring and employment of both domestic and foreign workers in the United States. Congress has enacted a variety of measures at different times to address different problems in the workplace and these provisions should be construed to the extent feasible in such a fashion as to harmonize with each other.

United States immigration procedures are administered principally by the Immigration and Naturalization Service (INS), which oversees border enforcement, deportation of aliens, some visa petitions, adjustments of immigration status, and citizenship adjudication, but other agencies have immigration-related responsibilities as well. The Department of Labor processes petitions for employment-related visas to ensure compliance with all labor statutes and regulations, while the

Department of State issues a variety of visas abroad through embassies and consulates. See generally, Peter M. Schuck and Theodore H. Wang, Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979 - 1990, 45 Stan. L. Rev. 115, 121-22 (1992).

A. The Immigration Reform and Control Act and its Non-Discrimination Provision

The Immigration Reform and Control Act of 1986 (IRCA), which was enacted as an amendment to the Immigration and Nationality Act, 8 U.S.C.§ 1101 et seq., made significant changes to national policy dealing with illegal immigration. Congress for the first time made it unlawful for an employer to knowingly hire an undocumented alien, or to hire any person without verifying within a specific period after hire the person's eligibility to work in the United States. A prospective employer is obligated to examine specified documents to verify the identity and employment eligibility of any worker hired after November 6, 1986, and to complete an Employment Eligibility Verification Form (Form I-9) within three days of each such employee's hire. 8 U.S.C. § 1324a(b).

Prohibitions were also enacted at the same time against certain unfair immigration-related employment practices, including discrimination with respect to hiring or recruitment for employment because of an individual's national origin or citizenship status. 8 U.S.C.
§ 1324b(1). Regulations implementing the employment eligibility verification system are set forth at 8 C.F.R. §§ 274a.1-.14 (1996), and regulations implementing the nondiscrimination provisions are set forth at 28 C.F.R. §§ 44.100-.305 (1996).

The overall Congressional purpose in enacting IRCA has been amply discussed in OCAHO case law examining the provision's legislative history. As was observed in Trivedi v. Northrop Corp., 4 OCAHO 600, at 2 (1994)[5]:

> Congress enacted IRCA in an effort to control illegal immigration into the United States by eliminating job opportunities for "unauthorized aliens."[6] H.R. Rep. No. 682, Part I, 99th Cong., 2d Sess. 45-46 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5649-50.

Similarly, in United States v. McDougal, 4 OCAHO 687, at 3 n.2 (1994), it was observed:

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[5] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 and 2 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 2, however, are to pages within the original issuances.

[6] An unauthorized alien is an alien who, with respect to employment at a particular time, is either (1) not lawfully admitted for permanent residence or (2) not authorized to be so employed by the Immigration and Nationality Act or by the Attorney General. 8 C.F.R. § 274a.1 (1993).

> The U.S. Commission on Immigration Reform has stated that: Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of illegal immigration will be impossible (citing the Statement of Barbara Jordan, Chair of U.S. Commission on Immigration Reform Before the Subcommittee on Immigration and Refugee Affairs, Committee on the Judiciary, U.S. Senate (Aug. 3, 1994)).

IRCA permits, but does not require, an employer to prefer a United States citizen over an equally qualified non-citizen. 8 U.S.C. § 1324b(a)(4). It does not permit an employer to prefer a non-citizen over a citizen and it expressly prohibits the hiring of undocumented workers.

B. Alien Labor Certification and The Immigration and Nationality Act

Other provisions of the INA provide that:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A) (1994).

The purpose behind this section is to protect domestic workers. S. Rep. No. 748, at 15 (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3333; H. Rep. No. 1365, at 50-51 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1705; see also Wang v. INS, 602 F.2d 211, 213 (9th Cir. 1979), Mehta v. INS, 574 F.2d 701, 704 (2d Cir. 1978).

The section is written in such a fashion as to set up a presumption against the importation of foreign workers, and a statutory preference for citizens and permanent resident aliens. The presumption may be overcome by showing that no qualified United States workers are available and that the employment of lawful aliens will not adversely impact wages and working conditions. Case law construing the legislative history of these provisions makes the
congressional intent abundantly clear. The Supreme Court has observed:

> The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers . . . . First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers.

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 596 (1982) (emphasis added).

Regulations implementing the certification of skilled and unskilled workers are set forth at 20 C.F.R. Pt. 656 (1997), as amended. Ordinarily the sponsorship of an employer willing to offer full-time, permanent employment is required. Two parts are necessary for application; one, a description of the offer of employment, the other, a statement of the qualifications of the alien which must be signed by the prospective employee. 20 C.F.R. § 656.21(a). The first part of the application form must also be sworn to or affirmed under the penalties for perjury and show, inter alia, that the employer has funds available to pay the wages, the wages will equal or exceed the prevailing wage, and that the job opportunity is open to any qualified United States worker. 20 C.F.R. § 656.20 (c)(1), (2), (8), (9). United States workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. 20 C.F.R.
§ 656.21(b)(6).

Aliens and employers are permitted, but not required, to have agents represent them in the labor certification process, and if they do so, they must sign the statement on the application that the alien and/or employer takes full responsibility for the accuracy of representations made by the agent. 20 C.F.R. § 656.20(b)(1).

C. Issuance of Visas

The Immigration Act of 1990 (IMMACT) established initial annual quotas for a limited number of visas for family sponsored, employment based, and diversity immigrants. 8 U.S.C.
§ 1153(a)-(c) (1994). In order to obtain an employment-related immigrant visa it is necessary to have both a petition approved by the Attorney General and a labor certification issued by the Secretary of Labor. 8 U.S.C. §§ 1153(b)(2) and (3), 1182(a)(5)(A) (1994).

State Department regulations governing the issuance of non-immigrant visas are found at 22 C.F.R. Pts. 40-41 (1996), while INS regulations are found at 8 C.F.R. §§ 214.1-.2 (1996).

IV. SUMMARY OF THE EVIDENCE

A. Local 455's Witnesses and Exhibits

In the fall of 1994 the construction industry was not doing well in New York and the union had a lot of skilled, experienced workers with no jobs. (Tr.506). Anthony Rosaci testified that he personally searched out ads for jobs, trying to find work for union members, even in non-union shops. (Tr.507). He received a notification from the New York State Department of Labor in November 1994 stating that there had been an application for labor certification for a job as an ornamental iron worker at Lake Construction. (Tr.512-13). This was the second time Rosaci had been notified of such application by Lake for labor certification for a welder. On the prior occasion Rosaci had previously sent resumes of members to Lake in response to a different notification of another opening for a welder-fitter.[7] (Tr.553, 582). Rosaci believed he had done this in June 1994. It is undisputed that Lake had previously made another application in October of 1993 seeking labor certification for an iron welder (welder-fitter). (CX15). Rosaci never heard further from Lake about the first opening (Tr.582) and the application was withdrawn on August 3, 1994. (CX15).

On November 22, 1994, Rosaci sent the resumes of Leonard Anderson, Louis Borkowski, Andrew DeSimone, Guy Giarrusso, Tea Graham, and Kenneth Mansmann to Lake's address at 150 King Street, Brooklyn, N.Y. 11231 by certified mail, return receipt requested, together with a letter (CX5) indicating their interest in the second welder job. Shortly thereafter he was called by a woman who identified herself as Dulce Cuco, who stated that she represented Lake and who asked him if the applicants for the job spoke Spanish or Portuguese. (Tr.515). He told her that the six applicants whose resumes he had sent did not, and questioned the necessity for such a requirement. Cuco told him that the employer wanted workers who could communicate with his customers and Rosaci told her that he would search his records and let her know if anyone met the requirement. (Tr.517). She promptly faxed him a copy of a newspaper ad (CX4) for the job which contained her telephone number and a job description including the language requirement. (Tr.516).

On December 8, 1994, Rosaci sent Lake two more resumes, for Isidro Barreiro and Edson Barbosa, both of whom satisfied the language requirement. (Tr.517-18). Again, the resumes were sent to Lake's address in Brooklyn by certified mail, return receipt requested. (CX6). This time Rosaci faxed copies to Cuco as well. (Tr.518). Cuco called him again and set up interviews for Barreiro and Barbosa with a representative from Lake Construction to take place on December 19, 1994 in Newark, New Jersey. (Tr.519). Rosaci drove Barreiro and Barbosa to Newark and waited at the Capital Agency, the office at 329 Ferry Street designated for the interviews, but the interviews never took place. (Tr.520-22). Dulce Cuco told him that there had been an accident on a job site and the employer wasn't there. (Tr.521). They waited until Cuco told them the employer wasn't coming and that they had to leave. (Tr.522). They never heard any more about the job. (Tr.523).

Later Rosaci found out that Lake's second application for labor certification for a welder was still pending at the Department of Labor. (Tr.524). It is undisputed that the application remained active until it was rejected by the Department of Labor on July 27, 1995 (CX8), and that Hermo, the undocumented worker, continued to work for Lake during the entire period of its pendency and up until

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[7] Welder-fitter is the same occupation as construction welder. (Tr.530).

the present time although he continues to be ineligible for employment in the United States. (RCRFA2 Nos. 52, 53, 55, 64, 65, and 66).

Anderson, Barreiro, Borkowski, DeSimone, Giarusso, and Mansmann each testified that he was unemployed or on layoff in November 1994 (Tr.34, 39, 53-54, 111, 133, 154, 164, 456), and that when asked by the union's Financial Secretary/Treasurer, Anthony Rosaci, whether he was interested in a job at Lake Construction he agreed to have Rosaci forward his resume to the company. (Tr.34, 54, 110, 457, 132, 154). Edson Barbosa is not a complainant in this case. He testified that he was born in Brazil and has been in the United States since 1984. (Tr.78). He has been a member of Local 455 since 1987. (Tr.80). He is fluent in Portuguese (Tr.81), and he has 30 years of experience in the iron work trades. (Tr.86). Both Barbosa and Barreiro testified that they went to Newark with Rosaci on December 19, 1994 for the purpose of being interviewed for the welder's job at Lake. (Tr.83, 458). However, the interviews did not take place. Dulce Cuco explained that there had been an accident. (Tr.101-02, 459). Both Barbosa and Barreiro filled out applications (Tr.84, 459), but neither was contacted.

Documentary evidence was also offered in support of complainants' case. Complainants' exhibit 1 (CX1), is a Department of Labor form ETA 750, an application by Lake Construction for alien employment certification. Part A of the application is captioned "Offer of Employment," and provides evidence of an offer of employment to an alien identified as Jose Manuel Perez Hermo. The form states that Hermo holds a B-2 visa. The employer's business activity is identified as "construction iron works" and the job title as "iron welder." The basic pay rate is given as $15.00 an hour, $19.00 for overtime. The typed job description reads:

> to do all specialty work in iron welding, and shaping. Must know how work independently from scratch cutting and welding into shape all type of iron. For stairs, window bars, all types of things made of iron for homes ect. (sic)

A handwritten addition dated August 26, 1994 with illegible initials adds a more detailed description and two drawings appearing to represent different styles of fencing. The addition reads:

> use arc, mig, and gas welding to shape iron into letters, different designs, on gates or window bars by special order ornamental.

One of the boxes on the second page asks the applicant to describe efforts to recruit United States workers and the results. The typed response reads:

> Have ran ads in Star-Ledger and local newspaper have put (posted) papers and signs and mostly the ones who applied were illegal or did not have the experience or did not know how to weld iron into shapes.

This page of the form also sets forth eight specific certifications of the employer, including representations that the job opportunity has been and is clearly open to any qualified United States worker, that the job opportunity does not involve unlawful discrimination and that its terms and conditions are not contrary to federal, state, or local law. It also includes a declaration of the employer pursuant to 28 U.S.C. § 1746 under the penalty of perjury that the representations contained therein are true and correct, signed by Manuel Tobio, Owner, and dated February 11, 1994. The declaration is followed by a printed authorization of agent of employer, also signed by Manuel Tobio and dated February 11, 1994, which states:

> I HEREBY DESIGNATE the agent below to represent me for the purposes of labor certification and I TAKE FULL RESPONSIBILITY for accuracy of any representations made by my agent.

The typed name and address of the agent is Dulce M. Cuco, 329 Ferry St., Suite (sic) Newark, N.J. 07105. A handwritten addendum follows which is only partially legible. It states that Cuco is the paralegal handling the case for attorney Susan DiNicola.

Complainants' exhibit 2 (CX2) consists of a letter on Lake Construction stationery, dated August 23, 1994, and signed by Manuel Tobio. It states:

> RE: Employee Information / and Company functions The nature of our Company's business is General Contractors, it specializes in Iron Works. The company works with Ornamental, Ornate, and Cast Iron, products. We have approximately 50 employees currently on the payroll. Our gross Revenue for 1992 and 1993 was 7-million each year. One other employee holds the specialized job, contract certification is asking for, with language requirement. Only one other employee holds job alien was offered. This business has enough work to guarantee continuous year-round employment for this alien and all other employees on the payroll.

The words "COMPANY SEAL IF ANY: Here:" are typed in the lower left part of the page and an illegible seal appears there.

Complainants' exhibit 4 (CX 4) consists of both an enlargement and a photocopy of a newspaper ad from the New York Post of Monday, November 21, 1994, which states:

> ORNAMENTAL IRON WELDER Brooklyn. Iron welding & shaping, and special order designs. Ornamental welding for stairs, gates, window bars, etc. Must be able to shape into letters & weld & cut into shape all types of iron. Must use arc, mig, & gas welding. 2 yrs. experience required. Must speak Portuguese or Spanish. Smoking only where permitted. 7:30 am to 4:30 pm, 40 hr. wk. $24.80 per hr & $37.20 per hr. overtime as needed. Send resume or letter in duplicate to #MM216, Room 501, 1 Main St., Bklyn, NY 11201.

A handwritten addendum on the enlarged copy reads: "ATT: Mr. Anthony Rosaci=Iron Workers. *Contact Dulce For: Lake Construction Manuel Tobio 201-578-4287."

Complainants' exhibits 5 and 6 (CX5 and CX6) are letters from Anthony Rosaci to Lake Construction dated November 22, 1994, and December 8, 1994 accompanied by certified mail receipts showing delivery on November 23, 1994 and December 9, 1994 respectively. Complainants' exhibit 7 (CX7) is a letter to Anthony Rosaci from the New York Department of Labor notifying him that there is a job opening for an ornamental iron worker with Lake Construction, that the 30-day recruitment period would begin on November 7, 1994, and that the job number was MM216.

Complainants' exhibit 8 (CX8) is a Notice of Findings from the Department of Labor dated July 27, 1995, which states that unless rebutted by August 31, 1995 the findings would become the final decision of the Secretary denying Lake's application for labor certification, and that failure to file a rebuttal would indicate that the employer had declined to exhaust administrative remedies. Specific findings were made that the foreign language requirement was not supported by business necessity and that Edson Viana Barboso (sic) and Isidro Barreiro were qualified for the position and rejected for unlawful reasons. No findings were made respecting the other applicants, but the good faith of the method of the recruitment was questioned.

Complainants' exhibit 10 (CX10) is Lake's business brochure titled "Lake Makes Your Vision Reality." Complainants' exhibit 11 (CX11) consists of documents from Jose Hermo's personnel file. Complainants' exhibit 12 (CX12) is a letter to Anthony Rosaci dated December 11, 1996 from the Occupational Safety and Health Administration (OSHA) of the Department of Labor in response to Freedom of Information Act request #96-321. It includes documents related to Case No. 107198020 opened October 25, 1993 and closed March 8, 1994, dealing with safety violations at Lake Construction. Attachments of 41 pages accompany the response detailing the violations.

Complainant's exhibit 13 (CX13) is a Notice of Filing of an Order and Determination of the New York Commissioner of Labor filed on March 19, 1993 in Prevailing Rate Case 89-8134 in Washington County, Matter of Lake Construction and Development Corp., Prime Contractor. It finds a willful failure to pay prevailing wages to 24 iron workers.

Complainants' exhibit 14 (CX14) is a collection of four groups of payroll records produced by Lake in discovery and includes Earnings Recaps by Employee, Employee Earning Records, W-2's, and Payroll Data Sheets. Complainants' exhibit 15 (CX15) is a letter to Anthony Rosaci dated December 26, 1995, from counsel's office at the Department of Labor in response to a Freedom of Information Request for a list of alien labor certification applications filed by Lake since January 1, 1993. It states that Lake filed an application on October 13, 1993 for a construction welder (welder-fitter) which was withdrawn on August 3, 1994, and an application for a brownstone worker (stonemason) on July 25, 1994 which was withdrawn on October 10, 1995. No information was given as to the names of the persons on whose behalf the applications were made.

Complainants' exhibits 17 and 19 (CX17 and CX19) consist of two sets of responses to requests for admission dated June 21, 1996 and September 27, 1996 respectively. Included among the admissions are the following:

> The signature on the two-page document [CX1] is genuine. (RCRFA1 No. 36).
>
> [CX2] is authentic and genuine and its contents are true. (RCRFA1 No. 37).
>
> Respondent authorized Jose Manuel Perez Hermo to use respondent as the sponsor employer to obtain legal residency in the United States via the alien employment process in 1994. (RCRFA2, No. 45).
>
> Respondent did not complete an Employment Eligibility Verification (Form I-9) for Jose Manuel Perez Hermo upon his hire. (RCRFA2, No. 54).
>
> Respondent is illegally employing Jose Manuel Perez Hermo. (RCRFA2, No. 55).
>
> Prior to Jose Manuel Perez Hermo seeking legal residency in the United States via the alien employment process, respondent had sponsored at least one other worker for legal residency in the United States via the alien employment process. (RCRFA2, No. 51).
>
> From time to time Lake has hired undocumented workers. (RCRFA2, No. 69).[8]

Complainants' exhibit 20 (CX20) consists of respondent's final discovery responses dated February 13, 1997 pursuant to an order granting the complainants' motion to compel.

B. Lake's Witnesses and Exhibits

Manuel Tobio, Lake's Vice President, initially testified that Lake does not do iron work now. (Tr.243). On cross-examination, however, he answered the same question by saying he didn't know. (Tr.257). Tobio acknowledged that Hermo was an undocumented worker whom he had initially hired as a welder (Tr.242-44), but said that Hermo's job now was as a laborer, sweeping the floor, pushing a wheelbarrow, loading or unloading a truck, or washing. (Tr.244). He also acknowledged that he had agreed to sponsor Hermo for alien labor certification (Tr.216), and that he signed CX1, the application for alien employment certification (Tr.218). He could not remember whether or not the

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[8] In response to the request that respondent admit that it hires undocumented workers (CRFA2, No. 70), the response was "Unable to admit or deny. From time to time Respondent has hired undocumented workers. Upon information and belief however, Respondent does not make a policy of hiring undocumented workers." The testimony of George Lucey also confirmed that Lake has hired undocumented workers over the years. (Tr.370).

form was filled out when he signed it (Tr.223), but he signed it in two places. (Tr.224-25). He did not fill it out himself and the handwriting on it is not his handwriting. (Tr.248). He said he did not really read CX2 before signing it. (Tr.253-54). In fact he reads very little. (Tr.247). He had given Hermo a blank piece of Lake letterhead stationery on a prior occasion. (Tr.228, 306) He was unable to state whether or not the seal on CX2 was Lake's company seal. (Tr.231). Though Lake has a company seal, he himself has never used it. (Tr.231). The only person who would be authorized to use the company seal would be the president. (Tr.231). He did not remember if the seal was on the letter when he signed it. (Tr. 232). He did know when he signed CX2 that it was about the labor certification and for the purpose of helping Hermo obtain a green card. (Tr.232). However he did not fill in the form (Tr.248), he did not ever meet or pay Dulce Cuco (Tr.246), he did not authorize the newspaper ad or talk to Dulce Cuco (Tr.256), and did not himself file the forms with the Department of Labor or know who did. (Tr.254). He does not know Lake's gross revenues. (Tr.303-04). The comptroller or Lucey might know. (Tr.304-05). He did not think Hermo would know. (Tr.305).

He identified the signature on the return receipt cards accompanying Rosaci's two letters to Lake (CX5 and CX6) as being Carl Tortorella's signature (Tr.237-38), but had no recollection of seeing the letters from Local 455 or the accompanying resumes of the complainants. (Tr.300). He did not sign RX1,2,3, or 6, other documents filed with the Department of Labor purporting to contain his signature (Tr.250-51, 255), and had no idea how the person who did could have obtained the names of the applicants. (Tr.301). He never saw the resumes of the applicants (Tr.300), and cannot explain how Dulce Cuco would have obtained them. He also had no recollection of having seen copies of the letters sent by the Department of Labor to attorney Susan DiNicola which indicated that copies had been sent to him, or CX8, the Findings of the Department of Labor. (Tr.239-41). In all, there were five letters from the Department of Labor and two from the union which were sent to Lake which Tobio could not remember ever seeing. (Tr.239-40).

George Lucey testified that he has been the President of Lake for thirteen years and is also an officer of G.F. Lucey & Associates, and of Saratoga Leasing, and a partner in LCD Partnership. (Tr.313-15). He was initially unable to state what Lake's gross revenues were for 1992 and 1993, but when reminded about his deposition testimony, he confirmed that 7 million was probably the correct figure, though it is not exact. (Tr.311-12).

Lucey identified the Stuyvesant Square Park fence as one of last major iron jobs Lake did. (Tr.317). This was the last major iron job not subcontracted out. (Tr.326). He said that any major iron work "probably past 1990 or 1991 or getting into 1992" was subcontracted ("subbed" or "lumped") out. (Tr.317). The next "real ironwork" was the Bayonne Bridge which was a major iron job. (Tr.317). The Bayonne Bridge job was in 1992 and was subcontracted out to East Jersey Steel. This was the first major iron job to be subbed out (Tr.320), and Lucey handled the contracts himself. (Tr.320). The proposal was in writing. (Tr.322). There was nothing major between the Bayonne Bridge and the next iron work job Lake subcontracted out on the New York side of the Alexander Hamilton Bridge in 1994. (Tr.329-30). There were cracks in the steel girders on the bridge and it was a major repair job. (Tr.330-31). Local 40 workers were used and the firm that the work was subcontracted to was Lake

Steel, formerly East Jersey Steel. (Tr.332). Lucey just called someone at Lake Steel and asked if they could do the job. Lake Construction was paid by the state and Lake Construction in turn paid Lake Steel. (Tr.332). Lucey guessed that they paid by check. (Tr.447). An emergency on the Gowanus Bridge was handled the same way. (Tr.333). Local 40 people were hired again out of Lake Steel to install a railing on Harlem River Drive. (Tr.334). It was a major structure, with a bottom rail, and a top rail on both sides of the highway, 1500 feet multiplied by four because of the two rails on each side. (Tr.334). That job was in 1995. (Tr.335). The state paid Lake Construction and Lake Construction paid Lake Steel.

After the Harlem River Drive job, there were numerous jobs that required steel or iron work: "too many to answer." (Tr.335). Lucey made a distinction between major and incidental iron work. (Tr.316). Small iron jobs could occur if a piece of iron needed to be fixed on a truck or a picket fence on a job. (Tr.316). Lake does a little bit of iron work about every other day. (Tr.322). It just is not a major part of Lake's work. (Tr.325). Saratoga Bridge was not an iron job. (Tr.327). Only part of it was iron work. (Tr.327). Lake does not go out and do an iron job. (Tr.327). It might be working on a house and the fence falls down, or repairing an abutment and a steel bearing needs repair. This type of job would not be subcontracted out, but a major job would. (Tr.336).

Lake has sponsored other persons for labor certification whose names Lucey did not recall. (Tr.348). He was the person involved in those applications and believes the purpose to be to "try to get someone citizenship, someone that we can't find in the states that has that type of trade." (Tr.349). It has never been a job requirement at Lake for a worker to speak Spanish or Portuguese. Lake has hired undocumented workers over the years. (Tr.370).

Lucey stated that he had never seen CX8 until it was shown to him before his deposition. He did not recall or did not know that it had been produced by Lake in discovery and never saw it at Lake. (Tr.381-82). Lake is losing money this year and has laid off about 30 people. (Tr.391). He never spoke to Dulce Cuco or Susan DiNicola and did not retain them. (Tr.398-99). He did not speak to Hermo other than to exchange pleasantries. Lake does not normally advertise for workers. (Tr.401). It gets employees through a friend, or a cousin or an uncle. (Tr.401). Lake is not looking for skilled people because it has skilled people. It looks for laborers. (Tr.401-02). Lucey thought the signature on the return receipt cards accompanying CX5 and CX6 was Carl Tortorella's signature. (Tr.444-45).

Vincent Meli testified regarding record keeping and payroll documents.

Jose Hermo testified that a friend of his referred him to Dulce Cuco when he was thinking about getting legal status in the United States. (Tr.617). He went to an office in Newark on Ferry Street to meet her. (Tr.618). He never met or heard of attorney Susan DiNicola. (Tr.618). Dulce Cuco asked him if his boss would sponsor him. (Tr.644). She asked him what kind of work he did but did not ask questions about the company. (Tr.645). She asked him for $3,500.00, half initially and half when he got his green card. He paid Cuco $1,750.00 by personal check. (Tr.619). He asked Tobio if he would sign the application and sponsor him so that Hermo could get legal status. (Tr.620). He told

Cuco that Tobio had agreed, and a couple of days later she gave him the application in an envelope to take to Tobio. (Tr.621). Hermo did not open the envelope or read the application. (Tr.621-22). He gave it to Tobio early in the morning around 6:45 a.m. and got it back at the end of the work day around 3:15 or 3:30. (Tr.646). That was in February 1994. He delivered it back to Cuco. Later she asked him for a blank piece of paper with the company name on it. (Tr.623). He asked Tobio for the paper and Tobio gave it to him. (Tr.622, 647). Tobio asked what it was for and Hermo told him it was to put information about the company. (Tr.623). He took the paper back to Cuco and she later called him and said the papers were ready. (Tr.623). He went to her office and picked up the envelope and then took it to Tobio. (Tr.624). When Tobio returned it, Hermo took it back to Cuco. (Tr.624). Later she called and told him he had to pay for a newspaper ad. (Tr.624). He paid her $400.00 for the ad but has not seen her since. (Tr.625). He did not give Cuco any information about the company and has no idea where she got the information set out in CX2. The signature on RX4 is not his signature and he did not help fill it out. (Tr.649). Hermo confirmed that he was hired to work on the cast iron fence. (Tr.629). There are no big iron jobs now. (Tr.630). He said his rate is $15.00 an hour. (Tr.635). Sometimes there is a little iron work, fixing a truck or welding a machine. (Tr.631). He might do concrete work or help the carpenters or load trucks. (Tr.631). His hourly rate is the same no matter what the work is. (Tr.634). Sometimes on a state job or on the highway there is a higher rate. (Tr.634-35). Hermo's W-2 forms reflect earnings in 1990 of $17,069.95; in 1991 of $26,899.63; in 1992 of $31,970.58; in 1993 of $32,075.70; in 1994 of $33,084.32; in 1995 of $33,133.51, and in 1996 of $35,267.28. (CX11).

Documents entered into evidence by Lake included RX1 dated December 23, 1994 and captioned "Days of Postings." It states that postings for the job were put up on trucks and office windows from November 21, 1994 until December 22, 1994 and purports to be signed by Manuel Tobio. RX2 is also dated December 23, 1994 and captioned "Results of Postings." It also purports to be signed by Manuel Tobio. It states:

> We had one applicant to the postings on the trucks. His name is Helder Joseph Rocha, application is attached , and he was hired the day he came for an interview. He started working the following day on December 7, 1994, he was an excellent workeer (sic), did beautiful work, at the end of the day he informed us his leg hurt to much to stand up so long, that he knew he could not do the work sitting down but he couldn't take the pain. I told him maybe it was because he hadn't taken a brake (sic), he said probably, then turned and said he would be back the next day, he never returned, I sent him a letter and tried calling twice but he never returned. So we put him down as quit.

RX3 is also dated December 23, 1994 and is captioned "Job Related Reasons and Results for Each Person Not Hired". It states that applications are attached. It indicates that Edson Viana Barbosa applied and was not called because of a language problem. It states that Brasilian, though not far from Portuguese, would be a problem, and that Spanish people would not be able to communicate with him. It also asserts inability to verify any of his jobs or prove he qualified for the work he said he performed. It states further that Isidro Barreiro applied way after the recruitment period was over, that he was

called twice and a letter was sent to him and no response was received. It indicates that he would have been given a chance after the man hired only worked for one day, so he was called on Tuesday December 20, 1994 and on Wednesday but no one answered. It states also that Kenneth Mansmann, Tea Graham, Leonard Anderson, Louis Borkowski, Guy Giarusso, and Andrew DeSimone were referred by Local 455 but did not qualify because of the language, and that these were all the applicants and rejections.

RX4, dated February 22, 1994, appears to be the employee portion of the Application for Labor Certification and purports to be signed by Jose M. Perez Hermo. It designates Dulce Cuco as an agent and describes the job as "Do all welding and shaping of iron and aluminum for railings, stairs, window bars, cut the iron, ect (sic)." It also gives Hermo's work history.

RX6 is dated August 13, 1994 and captioned "Foreign Language Necessity Requirement." It purports to be signed by Manuel Tobio and explains that 95 percent of the clients speak one of those languages and the worker must be able to communicate with the clients.

RX7(a) through 7(e) are W-2 and 1099 forms and other records of income for complainants Anderson, Mansmann, Barreiro, Borkowski, and Giarusso while RX9 consists of W-2 forms for complainant DeSimone. RX10 is an employment application dated December 19, 1994 and completed by Isidro Barreiro.

Lake also moved into evidence CX9, Affidavit of Dulce Cuco dated August 22, 1996. It states that Hermo contacted her for assistance and his case was retained by Susan DiNicola, an attorney. Cuco and Capital Agency staff filled out the labor certification forms. When the Department of Labor requested more information, a company representative provided the information to Capital Agency and initialed changes. It states that the scheduled interviews were canceled because Cuco was told by Lake that an accident had occurred on a work site and the owner would be unable to attend. She was told by Lake to have the individuals fill out applications and Lake would contact them later. The document was not authenticated and is also objectionable on other grounds. However, no objection was made to it and this exhibit was received in evidence for what it is worth. It is accorded minimal weight.

V. EVIDENTIARY DISPUTES

A. The Weight and Effect to be Given to the Findings of the Department of Labor (CX8)

At my request, the parties filed supplemental briefs to address the question of whether the findings of the Department of Labor (CX8) were entitled to be afforded any preclusive effect in this proceeding. Complainants asserted that these findings should be conclusively established; Lake argued that they should not. The findings for which preclusive effect was sought are that the foreign language requirement was not supported by evidence of business necessity, that Edson Viana Barbosa and Isidro

Barreiro were qualified for the job "and rejected for reasons that are not lawful," and that good faith recruitment was not carried out.

Because the initial findings were not appealed by Lake, they became the final decision of the Secretary by operation of law. 20 C.F.R. § 656.25(c)(3)(i). The notice (CX8) contained a warning that failure to file a rebuttal to the findings would constitute a failure to exhaust administrative appellate remedies and all findings would thereafter be deemed admitted. 20 C.F.R. § 656.25(e)(2)-(3). Had Lake wished to contest the result, an appeal would have been available to the Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R.
§ 656.26. BALCA hearings are formal, adversarial proceedings governed by the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" set forth at 29 C.F.R. Pt. 18 (1996). 20 C.F.R. § 656.27(f)(2).[9] Procedural rules for hearings are set forth in Subpart A, Rules of Procedure, and evidentiary rules in Subpart B, Rules of Evidence. Discovery procedures set forth at 29 C.F.R. §§ 18.13-.20 are comparable to those afforded by the Federal Rules of Civil Procedure.

An issue which was previously litigated and necessarily determined ordinarily may not be re-litigated. Historically the doctrine applied only between the same parties, but in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the Supreme Court abandoned the mutuality requirement and recognized that the doctrine may be used offensively to preclude a defendant from litigating a defense that the defendant has previously litigated unsuccessfully with another party, even in an administrative forum. Parklane, 439 U.S. at 331. In Parklane, the plaintiffs sought relief for alleged securities fraud involving the filing of a misleading proxy statement, an issue which the defendants had previously litigated and lost against the SEC. The plaintiffs sought to preclude the defendants from contesting the issues resolved against them in the SEC action. Parklane and other subsequent cases make clear that collateral estoppel may apply to the final determinations of administrative agencies as well as of courts.

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality.

Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991).

That collateral estoppel may apply in OCAHO proceedings, not only to judicial decisions but also to findings of administrative agencies, is also well established. See, e.g. Mackentire v. Ricoh Corp., 5

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[9] The Secretary of Labor has delegated the initial authority to grant or deny applications for alien labor certification to regional certifying officers. 20 C.F.R. § 656.24. The initial decision whether to grant labor certification is made by the certifying officer. 20 C.F.R.
§ 656.24(b). If labor certification is denied, an employer may seek review from the Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R. § 656.26-.27. Prior to the revision of these sections in April 1987, an administrative appeal was taken to a single administrative law judge.

OCAHO 746, at 6-9 (1995) (summary judgment by District Court that Title VII plaintiff was discharged for non-discriminatory reason forecloses issue in IRCA proceedings); United States v. Power Operating Co., Inc., 3 OCAHO 580, at 28-31 (1993) (under proper circumstances collateral estoppel effect would be available in an OCAHO proceeding for findings of the NLRB). Whether or not to afford preclusive effect to agency findings necessarily involves consideration of several factors.

> Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures.

Solimino, 501 U.S. at 109-10.

The general rule is that preclusive effect may be accorded to a judicially unreviewed administrative determination provided that the issue was actually decided in the prior proceeding and there was a full and fair opportunity to litigate it. Long Island Lighting Co. v. Imo Indus., Inc., 6 F.3d 876, 885 (2d Cir. 1993); De Cintro v. Westchester County Med. Ctr., 821 F.2d 111, 116-18 (2d Cir.), cert. denied, 484 U.S. 965 (1987). It is not required that the party have actually invoked the appellate mechanism. Neither does a full and fair opportunity necessarily require a formal adversarial hearing. United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 241-42 (1973); Kirkland v. City of Peekskill, 651 F. Supp. 1225, 1230 (S.D.N.Y.), aff'd, 828 F.2d 104 (2d Cir. 1987).

The proponent of collateral estoppel has the burden of showing that the issue in the prior proceeding was identical and decisive; the opponent has the burden of demonstrating that it did not have a full and fair opportunity to litigate the issue. Khandar v. Elfenbeing, 943 F.2d 244, 247-48 (2d Cir. 1991).[10] Thus Lake's argument that there was no showing of an adequate opportunity to litigate mistakes the allocation of proof: Local 455 need only show the identity and decisiveness of the issue. It is Lake's burden to demonstrate that it did not have a full and fair opportunity to litigate.

Here Lake argued that it did not participate at all in the Department of Labor proceedings either by counsel or otherwise. Testimony at the hearing seemed to imply that Lake did not know about the Department's findings. Both Tobio and Lucey denied any recollection of having seen CX8 prior to being shown it at their depositions. (Tr.239-41, 381-82). Lucey denied as well knowing that CX8 was produced by Lake in discovery in response to CRFP1 and said he never saw it at Lake.[11]

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[10] It should be noted that much of the federal case law dealing with issues of preclusion addresses considerations of federalism and full faith and credit: whether the federal courts will afford preclusive effects to the findings of a state administrative agency. These cases are not necessarily determinative when the issue is the effect which should be given by a federal administrative forum to the factual findings of another federal agency.

[11] This testimony is in conflict with exhibit C, attached to Lake's own Memorandum in

(continued...)

(Tr.381-82). Because it was produced by Lake in discovery, I cannot credit that no one ever saw CX8 at Lake.

Nevertheless because I have concluded that it is not sufficiently clear that the Department of Labor findings were identical to the questions addressed in this proceeding, I do not reach the question of whether there was a full and fair opportunity to litigate the issue. The precise nature of the unlawful reasons for rejection of Barbosa and Barreiro is never specifically set out in those findings, and while the employer's good faith recruitment was questioned, no specific finding was made that recruitment was not conducted in good faith.

That CX8 is not entitled to preclusive effect does not, of course, mean that it is without evidentiary value. It is entitled to and will be given substantial weight.

B. Lake's Objection to the Admission of Evidence of Safety Violations (CX12) and Prevailing Wage Violations (CX13)

On March 4, 1997, Lake filed a memorandum opposing the admission of CX12 and CX13 on the grounds that evidence of OSHA violations and/or prevailing wage violations was irrelevant to the issue of discrimination because other wrongful acts may not be considered to show a propensity to commit the act in question[12] and because the probative value of the exhibits is outweighed by the danger of unfair prejudice. See Respondent's Memorandum in Support of the Respondent's Objection to the Admission of Exhibits Number 12 and 13 for Use at the Hearing, at 4.

Complainants denied that the exhibits were offered for the reason Lake suggested and alleged in support of their admission that they were being offered for other reasons altogether. Evidence of other acts may be admissible as proof of motive. Complainants, citing In re Reyes, 814 F.2d 168 (5th Cir. 1987), cert. denied, 487 U.S. 1235 (1988), argued that respondent has a history of hiring undocumented workers, and that undocumented workers relying on an employer's sponsorship are more reluctant than lawful workers to complain about safety violations, prevailing wage violations, or other workplace violations. Complainants argue that the violations of labor laws are relevant evidence demonstrating Lake's incentive to hire and employ undocumented workers rather than United States citizens because undocumented workers are more willing to work in substandard conditions. See Complainant's Memorandum in Support of Use of Exhibits 12 and 13 at the Hearing, at 5. While there

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[11](...continued)
Opposition to Complainant's Motion for Summary Decision. Exhibit C, submitted by Lake, contains portions of Lucey's deposition testimony at page 20 in which he appears to state that when he received that document he sent it to his attorney. By this time, of course, the subject charges had already been filed with OSC.

[12] Respondent's Memorandum cites to "Rule 404(b) of the Federal Rules of Civil Procedure" to support this objection but plainly meant to cite Federal Rules of Evidence 404(b).

is certainly support both for the generalized conclusion as to why employers hire illegal workers, and also for particular concern about that practice in the construction trades, see, e.g., Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation, 103 Yale L.J. 2179, 2212 n.169 (1994),[13] there was no other foundation established to show that this was Lake's motive in particular. Lake did not specify and I did not discern in what manner the prejudicial nature of this evidence is claimed to outweigh its probative value.

1. The OSHA Violations (CX12)

Acetylene, oxygen, welding rods, and epoxy were involved in some of Lake's safety violations. CX12 also reflects that one of the accidents occurred at the office site where employees and equipment are dispatched and "some fabrication of road railings are (sic) done."

Lucey confirmed in response to questioning that oxygen and acetylene were used by iron workers to burn steel and that welding rods were used in iron work as well. (Tr.374-75). Rosaci too testified that welding rods were used to fuse metals together in the welding process. (Tr.527). He also testified that oxygen and acetylene were used in the cutting process called burning. (Tr.527). He said the union's training facility, a small operation, has two oxygen and two acetylene tanks. (Tr.528). One is in use and one is a spare. (Tr.528). When they empty out, Rosaci stated, you call the gas company, they pick it up and drop off a new set. (Tr.528). Common practice is to rent the cylinders. (Tr.528). You pay so much, so you wouldn't keep or store them unless you were going to use them. (Tr.528-29). The inspector's notes about violations observed at Lake's premises on October 26, 1993 state that six cylinders were observed and that the occupation involved was that of mechanic.

Lucey testified that he believed the OSHA violations occurred at the same time as the prevailing wage violation in 1992 (sic) and that they arose out of the same job. (Tr.370). However, CX12 reflects that the safety violations occurred in 1993 and that some of them took place at Lake's office site. CX13 indicates that the wage violations were at a job site at a bridge in Washington County in 1991. I held CX12 too speculative to establish Lake's intent (Tr.529-30), but admitted it as evidence that iron work was being done by Lake in October 1993, and that fabrication of road railings was being done on Lake's premises during the same period.

2. The Prevailing Wage Violation (CX13)

In addition to arguing that prevailing wage violations were relevant to Lake's motivation for hiring illegal aliens, complainants also assert that the particular violation (CX13) shows that Lake had at least 24 iron workers at a time when it claimed not to have or need iron workers, and that payroll records (CX14) show that nine of those iron workers still continue to be employed at Lake.

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[13] Citing Cal. Exec. Order No. W-66-93 (1993), reprinted in Cal. Econ. Dev. Dep't., News Release No. 93-66, New Strike Force Targets Underground Economy 3-4 (1993). The strike force, created October 26, 1993, targets the garment, construction, and auto repair industries.

CX13 concerns the willful underpayment of wages and supplements to workers employed on a public work project in violation of New York State Labor Law. The 24 employees named in the labor violation were George Mallory, Pedro Mosquera, Jose Tobio, Jose Ochoa, Manuel Vidal, Gary Robinson, Javier Rodriguez, Hilarion Palafox, Andera Lucy, James Bemiss, Miguel Rodriguez, Frank Prieto, Jose Adames, Jose Tome, Jose Cabral, Jose Martinez, Jose Gomez, Jose Fernandez, Jose Rosas, Juan Paz, Juan Perez, Paulino Romero, Jorge Borrereo, and Manuel Gillian. The notice provides that these workers were underpaid as iron workers. It further provides that the employer is entitled to a hearing (which was waived), that a final determination of willful violation would result, and that two such determinations within a period of six years make an employer ineligible for public work contracts for a period of five years.

Lucey testified that Lake had been found in violation of state prevailing wage provisions on only that one occasion, in 1992 in Saratoga on the Saratoga Bridge job. (Tr.363). Under New York labor law if you have two willful violations you're not doing business in the state any more. Lucey did not appeal the violation but wished that he had. (Tr.364-65). He said those workers were doing steel and paving and everything else, not just iron work. (Tr.366). Lucey thought Lake was found in violation of the Occupational Safety and Health Act (CX12) at the same time as the prevailing wage violation on the same job in 1992. (Tr.363, 370-71).

I admitted CX13 over Lake's objection (Tr.368-69) to the extent it showed there were 24 iron workers at the time of the violation in 1991, 9 of whom were still on Lake's payroll. Lucey confirmed that the individuals named in CX13 were Lake employees. (Tr.367). He also confirmed that some of the 24 workers listed were still Lake employees (Tr.436), but denied that they were doing iron work now. He didn't contest the violation because he was railroaded and misinformed. (Tr.436). CX13 appears to reflect that the wage violation occurred in 1991 in Washington County. While the Saratoga Bridge project was completed in 1991, it was located in Saratoga County (CX10C), not in Washington County. There is thus no corroborative evidence to support Lucey's testimony that the wage violation occurred at Saratoga, that it occurred in 1992, or that it occurred on the same job as the OSHA violations. The documentary evidence suggests otherwise.

C. Complainant's Motion in Limine

On March 5, 1997 complainant filed a motion in limine seeking to exclude evidence regarding respondent's "contracting out" of iron work jobs, or in the alternative for an order stating that Lake did not contract out any iron work during the period from 1994 to the present. As grounds for the motion, complainants pointed to Lake's failure for nine months to respond adequately to specific discovery requests dealing with this subject, even after I issued an order compelling responses. Lake filed an opposing memo on March 6, 1997 accompanied by an ex parte submission for which it sought in camera review which purported to be a copy of a search warrant and inventory dated January 17, 1997. The submission was made in order to support Lake's allegation that its records had been seized and were no longer in its possession.

Motions in limine in advance of a hearing or trial are disfavored motions. See Hawthorne Partners v. AT&T Techs., Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Accordingly, I stayed ruling on the motion in limine until the evidence was presented at the hearing. Because Lake would in any event have been allowed to make an offer of proof even had I decided that Lake's evidence should be excluded, I did not exclude any of the proffered evidence in advance. Rather, I admitted all the evidence conditionally, subject to a determination of the extent to which it would have been responsive to certain discovery requests.

I had previously taken under advisement the question of sanctions in connection with complainant's motion to compel. On January 30, 1997, I had issued an order granting complainant's motion to compel answers to certain interrogatories and requests for production of documents which had initially been posed in May 1996 and still had not been adequately answered. That order directed respondent to provide true, explicit, responsive, complete, self-contained, and non-evasive answers to interrogatories 7, 8, 14, and 15 and to respond fully to requests for production numbers 7, 14, 15, and 18. I stated unequivocally in that order:

> Let me be clear. This order compelling discovery is not an opportunity for further hide-and-seek. It is a one-time opportunity to do what long since ought to have been done: provide answers to interrogatories and produce documents in response to the requests in such a manner as to comply with applicable rules. Interrogatories are to be answered under oath fully and completely. Where information is unavailable, detailed and specific explanation is required as to the efforts made to obtain it. Similarly, with requests for production, detailed and specific explanations are to be made where ignorance or unavailability is claimed with respect to respondent's own records.

I took under advisement the question of sanctions pending compliance with that order, noting that the two sets of responses to the subject interrogatories to date had been so evasive and incomplete as to constitute no answers, and that compliance with requests for production were at best partial and at worst made in bad faith. I further found that Lake's dilatory, evasive, and incomplete responses had prejudiced the complainants' preparation for hearing because they could not rely upon Lake's responses as being either complete or accurate.[14]

1. Lake's Answers to Interrogatories

Interrogatory No. 7 as modified had requested the names of construction worker employees (non-administrative), including part-time and contract services employees since 1994, as well as their citizenship or immigration status, alien registration numbers, national origin and pay rates. Interrogatory No. 8 as modified requested the names of persons on whose behalf Lake had sought alien labor certification since 1992. Interrogatories No. 14 and No. 15 requested that Lake furnish the basis for its

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[14] The detailed history of the discovery proceedings is set forth at greater length in that order, Ironworkers Local 455 v. Lake Construction and Development Corp., 6 OCAHO 911 (1997).

denial of the complainant's allegations and for its first affirmative defense. My order of January 30, 1997 directed that these interrogatories were to be answered directly, not by reference to documents, and expressed my skepticism about Lake's claimed inability since May, 1996 to provide the names of its own construction workers, their immigration status, national origin, registration numbers and pay rates, as requested in Interrogatory No 7. Because it had already been established by undisputed labor department records that Lake had previously also sought labor certification for a welder-fitter in October 1993 and for a stonemason in July 1994, Lake's continuing representation that it had no knowledge of any other labor certification requests was simply untrue. Detailed, specific explanation was called for of precisely what efforts were made to obtain the information to answer the interrogatories, by whom, and when.

Lake finally made incomplete answers to these interrogatories on February 13, 1997. (CX20). For Interrogatory No. 7 the response for 1994, 1995, and 1996 consisted entirely of lists of names indicating that the names were "compiled from Lake's W-2 forms." No workers were identified as part-time or contract employees. The lists contained no information whatsoever as to the national origin, citizenship, immigration status, alien registration numbers or pay rates for most of these employees.

Pay rates were listed for the period January 12, 1997 through January 26, 1997 only, for 41 employees only, and these were claimed to be "subject to correction." Lake stated with respect to Interrogatory 7(d) that it had previously provided complainants with 120 Payroll Data Reports and 11 Employee Earnings Reports from 1994 to June 1996, the implication presumably being that the payroll records were responsive to the interrogatory asking for pay rates.

This implication was contradicted by the testimony of Lake's comptroller at the hearing. Vincent Meli testified that he has been the Comptroller of Lake for eleven years. Lake also has an independent payroll service, Accounting Statistics Company, which does the actual payroll, prints the checks and prepares the payroll tax returns. (Tr.171). The hours and pay rates are prepared at Lake and sent to the payroll service, and the checks come back. (Tr.171). The records in CX14 captioned "Earnings Recap by Employee" show the payroll services week number, the check date, the pay date, the check number, various deductions and net pay. (Tr.172-73). The records captioned "Employee Earnings Record" show a time period, an employee's name, a gross pay rate, a number of hours and the deductions. (Tr.175-76). The third group of records in CX14 consists of W-2 forms, also prepared by the payroll service for each employee. (Tr.177). The Payroll Data sheets are also prepared by Accounting Statistics for Lake Construction. (Tr.180). Lake furnishes the payroll service with worksheets from which the service generates the Payroll Data forms. (Tr.196-97).

The Employee Earnings Reports showed Jose Hermo's pay rate for the pay periods starting 1) January 2, 1994 to March 20, 1994; 2) March 27, 1994 to June 26, 1994; 3) June 26, 1994 to September 18, 1994; 4) September 25, 1994 to December 18, 1994; 5) January 1, 1995 to March 19, 1995;

and 6) September 24, 1995 to December 17, 1995. (CX14).[15] None were furnished for March to September 1995 or 1996. In each of the reports furnished Hermo's pay rate was shown as $25.95, among the highest rates in the documents provided. In Lake's final discovery responses (CX20), "estimated average" pay rates for 1994-95, on the other hand, were given as $12-$14 on private jobs and $17-$22 on public jobs. It was claimed that because of the seizure of records, pay rates could not be determined. "Estimates" for 1996 were $12-$19 and $19-$24.

Meli testified that although the rate of pay shown on the Employee Earnings Record for Jose Hermo is $25.95 per hour, that might not be his actual rate of pay. (Tr.188). He explained by way of example that on Hermo's Employee Earnings Record dated December 26, 1994, the "base hours" of 19.73 as listed actually represented a conversion rate. The base hours shown on the earnings record are thus not the actual hours worked. (Tr.194). The actual rate of pay would depend upon the kind of job he worked. A prevailing wage job would pay him $25.95 but a non-prevailing wage job would be paid at whatever his actual rate was. (Tr.188). A worker would make two different rates depending upon the job. (Tr.189). The conversion rates were used because the payroll service could only handle one rate of pay at that time. (Tr.187). Now the payroll service is able to handle two or more rates. A prevailing wage job is generally a public job with a municipal or other governmental authority, while a non-prevailing wage job is a private job. (Tr.195). The contractual amounts paid on a prevailing wage job are embodied in a contract which sets the rate, but in a private job no contractual amounts are specified. (Tr.195-96).

At the hearing when Lucey was asked, "How about the hourly rates for the workers in 1994?," he replied " I'm almost sure we did this. I'm almost positive we had the rates here, but if you go to the payroll reports we sent you, we could get it right off of there." When reminded of Meli's testimony, he acknowledged otherwise.

> Q: As a matter of fact, Mr. Gasthalter had Mr. Meli testify that it was impossible to determine the hourly rates from the payroll records yesterday.
>
> A: Mr. Meli did not say that, ma'am.
>
> Q: No. You are right. He didn't say that. He intimated that.
>
> A: Yes.

(Tr.380).

Although Lake's final discovery response listed $16.00 as Hermo's current rate, Payroll Data Reports for the weeks ending January 12, 1997, January 19, 1997, and January 26, 1997 reflect two additional rates for him, one of which is crossed out. The crossed out rate appears to be $20.45; the other rate

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[15] These documents were sent on November 27, 1996, after the motion to compel was filed.

is $24.24. Meli confirmed that the $24.24 rate would indicate a prevailing wage job. (Tr.209). Hermo testified his current rate was $15.00 per hour, but that it was higher on a public job. (Tr.634-35).

The pay rates listed in CX20 are incomplete and misleading in several other respects as well. Many of the names listed on payroll data reports for the weeks ending January 12, 1997, January 19, 1997, and January 26, 1997 are not even on the list of pay rates: Manuel Camean, Fernando Diaz, Victorio Diaz, Desmond Elie, Carlos Ferrer, Mario Funez, Francisco Gomez, Vincente Gonzales, Manuel Lago, Noel Lopez, and Carlos Melendez. Some names on CX20 do not appear on the payroll data sheets: Manuel Brana, Jose Da Costa, Hernani Da Silva, and Crescencio Diaz. Some of the pay rates on CX20 differ from the ones shown in CX14. While public job rates are shown on CX20 for only 10 out of the 41 employees listed, the payroll data sheets show at least one and sometimes two additional rates for each of the employees on that list whose names are in those reports.

Lake cannot have it both ways. First, in discovery it attempted to suggest that the payroll records were responsive to the interrogatory requesting pay rates and that they contained the information requested; second, at the hearing, its witness said that the documents do not mean what they say. Either the records are responsive or they are not. If they are not responsive, Lake abused the discovery process. If they are responsive, the testimony given at the hearing and the information given in CX20 can not be credited. The interrogatory in any event called for a direct, explicit, complete, non-evasive answer without reference to documents. This was not provided.

No information was provided as to the national origin or immigration status of any employee on the 1997 list either. A separate list consisting of only 28 employees was provided, six of whom were identified as citizens of the United States. (CX20). Four were identified only as "alien." Alien registration numbers were listed for 18 persons. Other than the six employees listed as citizens of the United States, no other information was provided as to the citizenship, national origin, or immigration status of the remaining employees.

When Lucey was asked at the hearing in regard to citizenship status, "Do you know why it is not listed here for 1994, 1995 and 1996?," his reply was, "I remember doing it ma'am, the citizenship of everybody." (Tr.379-80). It nevertheless does not appear in CX20.

Lake continued to maintain that it could not identify any other person for whom it had sought labor certification. The contention interrogatories, 14 and 15, were not answered with facts but with the general conclusion that Lake's denials and affirmative defense were based on George Lucey's personal investigation and determination that there was no basis for the allegations and no need for iron workers. The previous response to interrogatories 14 and 15 had claimed attorney-client privilege.

The response stated further that Lucey personally searched for records and reviewed files "at or about the time the Complainant's Interrogatories were transmitted to Lake which was at the end of May, 1996, as well as thereafter." It represented that Lucey also instructed Lake's secretary/office manager,

Carmen Montalvo, to review records and search for documents. It further stated that on January 17, 1997, 62 boxes of Lake's records had been seized pursuant to a search warrant, and that only 13 boxes had been returned.

Examination of the interrogatories and answers indicates that Lake's responses are still (or again) both incomplete and evasive. First, I do not credit that information as to the citizenship or national origin of current employees, or whether those employees are lawful permanent residents, refugees, asylees, conditional entrants (parolees), registered aliens, or undocumented aliens is not "available" to Lake. This is information which Lake is required by law to record and maintain for any employee hired after November 1986. Second, and more obviously, there is no claim that the information was not available from the employees themselves, or that anyone had even asked them for it. My order of January 30, 1997 specifically directed that the answers to interrogatories were not to be made by reference to documents, but by specific answers. All that would have been required to obtain the requested information to answer much of Interrogatory 7 is to have carried out the procedures mandated by 8 U.S.C. § 1324a, or to have asked the employees. Neither do I credit that Lake had no way to ascertain or provide accurate data detailing the actual pay rates of its workers, including Hermo. I conclude that the information would have been available to Lake upon reasonable inquiry and that reasonable inquiry was not made.

A party cannot limit its answers to interrogatories to a search for documents and ignore other information available to the party through its attorneys, subsidiaries, agents, officers or representatives. The party is required both to make reasonable efforts to obtain the information and to describe the steps taken to do so. Billups v. West, No. 95 Civ. 1146, 1997 WL 100798, at *10 (S.D.N.Y Mar. 6, 1997), vacated in part on other grounds, 1997 WL 177897 (S.D.N.Y. Apr. 11, 1997). Accordingly, answers to interrogatories which refer only to the unavailability of information because of inability to locate documents are unacceptable as being both incomplete and evasive. Alliance to End Repression v. Rockford, 75 F.R.D. 438, 440 (N.D. Ill. 1976). Although a corporation can respond only through an officer or agent, the answers must reflect the composite knowledge available to the party, not just the personal knowledge of the designated officer or agent. 28 C.F.R. § 68.19(a). The fact that the answer is unknown to the answering agent does not mean that it is not known to the party. Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464, 476 (D. Kan. 1996), vacated on other grounds sub nom. University of Texas v. Vratil, 96 F.3d 1337 (10th Cir. 1996). A party is charged with knowledge not only of what is available from its own books and records in its possession, but also from its officers, subsidiaries, and agents.

Where, as here, a party has been specifically instructed to answer interrogatories fully not by reference to documents, "but by direct, explicit answers to the questions asked," the failure to do that is effectively a failure to answer. The general rule even absent such an order is that answers to interrogatories should be complete in and of themselves, and should be in such form as to be usable at trial. International Mining Co. Inc. v. Allen & Co., 567 F.Supp 777, 787 (S.D.N.Y. 1983), Di Pietro v. Jefferson Bank, 144 F.R.D 279, 282 (E.D. Pa. 1992).

The order also called for detailed, specific explanations as to the efforts made to obtain the information, when they were made and by whom they were made. Lake has not indicated that it sought information from any sources whatever other than an internal document search. It has not explained why information contained in the documents allegedly seized in January was not previously provided in response to interrogatories posed in May of the preceding year. It has not asserted that it asked the Department of Labor or its own corporate or other attorneys for the names of the employees for whom it previously sought certification. It has not asserted that it asked its independent payroll service for any information or records.

Lake attempted instead to confuse the issue by dwelling on its alleged internal search for documents. A party cannot sidestep the duty to answer an interrogatory under 28 C.F.R. § 68.19 by saying it looked but that it has no documents reflecting the information. Whether or not there are documents reflecting the information is not the appropriate test of whether the information requested by an interrogatory is "available" to the party. The word "available" does not mean "contained in a document." There is no reason to believe that most, if not all, the requested information would not have been available in the face of a good faith effort to obtain it and no such effort is set out. Efforts to obtain the information to answer the interrogatories should have been set forth in detail. The rules require that the steps be detailed and that reasonable inquiry be made. Lake has made no attempt whatever to explain what if any reasonable inquiry it made beyond generalized claims of searching for documents. It is evident that Lake did not respond with the candor and specificity required by the rules.[16]

2. Lake's Responses to Requests for Production

Specific requests for documents to which Lake was ordered to respond included Request No. 7, for documents regarding the qualifications of any person on whose behalf Lake sought labor certification; No. 14, for documents relating to job duties, job titles, citizenship status, and pay for construction workers since 1994; No. 15, for payroll documents, including payment for contract services for construction workers since 1994; and No. 18, for documents related to labor certifications applied for by Lake since 1990.

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[16] Lake's casual approach to OCAHO rules is also reflected in RCRFA1. Notwithstanding the clear command of 28 C.F.R. § 68.21(c) that an answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he/she made reasonable inquiry and that the information known or readily obtainable is insufficient to enable the party to admit or deny, seventeen of complainant's forty-one Requests for Admission were answered by Lake's stating only "Unable to admit or deny." (CX17). Such a response ignores altogether the requirement of reasonable inquiry. OCAHO case law has long held that such responses are wholly inadequate. United States v. O'Brien, 1 OCAHO 142, 984 (1990). Cf. Diederich v. Department of the Army, 132 F.R.D. 614, 619 (S.D.N.Y. 1990).

Generalized assertions are also made in response to the Requests for Production. While it is alleged that George Lucey personally conducted a search for documents sought by Request No. 14 in May 1996 and thereafter, the response says only that "Lake" searched for documents relating to Requests No. 7 and 18 relating to labor certification. Lucey "confirms" that a search was made. As a company can act only through its agents, this response is lacking in that it fails to set forth who undertook the effort and specifically what was done. Request No. 7 asked for documents reflecting the qualifications of any person on whose behalf Lake sought labor certification, including personnel files, employment applications, resumes, test scores, W-2, 1099, and I-9 forms, references, and interview notes. Lake's response refers back to Interrogatory 7 (which asked only about the identity of those persons), then asserts "Lake has specifically sought to locate the applications of any individuals it may have sponsored or any documents concerning those applications." Specifically how "Lake" would go about searching for an application made by a person whose identity it claims is unknown is unelaborated, notwithstanding a clear instruction to set forth specifics as to what efforts were made and by whom. No documents other than applications are addressed in this response. Lake has not even indicated whether the two other persons for whom it previously sought certification are current employees. Neither has Lake asserted that it asked the Department of Labor for copies of its applications or supporting documents.

In response to Request No. 15 for payroll documents, including payment for contract services for construction workers, it was represented that Lucey had searched at the time the request was transmitted in May 1996 and thereafter, that the responsive documents either had been or were being produced and that Lake could furnish no other documents. Once again, it was asserted that because Lake's records were seized on January 17, 1997 the documents were not in Lake's possession. (CX20). Lucey's testimony at the hearing was also a generalized claim that he looked for documents to respond to the complainants' discovery requests and gave complainants boxes of records; he said he turned the office upside down looking for documents. (Tr.410-15).

What documents are in respondent's physical possession is not, of course, the appropriate inquiry. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 164 n.6 (1980) (Stevens, J., concurring in part and dissenting in part). That was made abundantly clear in my prior order and notwithstanding that order, Lake's final discovery responses (CX20) are notable for the total absence of any representations as to any good faith effort to obtain any documents which respondent has a lawful right to obtain regardless of their physical location.[17]

A party controls documents that it has the right, authority, or ability to obtain upon demand. Scott v. Arex, Inc. 124 F.R.D. 39, 41 (D. Conn. 1989) (citing Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984)). That the documents may be in the actual possession of another, even a non-party, is not

[17] Lake had sought throughout this proceeding to limit discovery. Its first response to discovery requests was expressly limited to facts within its physical possession on the date of the response. For this reason I made crystal clear in the order compelling responses that more was required.

the issue. The question is whether the party has the legal right or the practical ability to obtain the documents. Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994). Neither the ownership nor the location of the documents is determinative. M.L.C., Inc. v. North Am. Philips Corp., 109 F.R.D. 134, 136-37 (S.D.N.Y. 1986). Cf. A. F. L. Falck , S.p.A. v. E.A. Karay Co., Inc., 131 F.R.D. 46, 48-49 (S.D.N.Y. 1990); EEOC v. Kim and Ted, Inc., No. 95C1151, 1995 WL 745836, at *4 (N.D. Ill. Dec. 12, 1995). No assertion is made that Lake sought duplicate payroll documents from its independent payroll service, or for that matter, that it asked to copy the records allegedly seized. Lake could have requested copies of its own submissions to the Department of Labor; it clearly did not do so.

My prior order was as clear as it was unambiguous on this point. The order compelling responses, moreover, not only required that detailed and specific explanations were to be given as to the efforts made to obtain documents, but also expressly stated: "If a document was in existence but no longer is, respondent is required to explain if it is missing, lost, destroyed, or otherwise disposed of." The order, citing Cooper Indus. Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919 n.2 (2d Cir. 1984), specifically set out as well that the burden of proving that the corporation was not in control of its own records was on the corporation. Notwithstanding other explicit instructions that detailed, specific explanation was to be provided as to any document which was missing, lost, destroyed or otherwise disposed of, no such explanation was provided. At the hearing, however, when pressed about the total absence of contracts, canceled checks, pay records, or any other documents evidencing Lake's alleged contracting out of iron work, Lucey stated with respect to at least some of these records:

> Our contracts, paperwork that had anything to do with the jobs. I just destroyed them, got rid of them, threw them in the dump. (Tr.417).

Why he waited until the hearing to say so is unexplained.

Case law grafts onto the discovery rules the requirement of good faith. The discovery process is subject to the overriding limitation of good faith and callous disregard of discovery responsibilities cannot be condoned. O'Brien, 1 OCAHO 142, at 984 (citing Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1245 (9th Cir. 1981)). Measured by these standards, Lake's belated and partial responses are inadequate and, in addition, fail to demonstrate any of the steps reasonably necessary to ensure that the responses were accurate and complete.

I reach this conclusion based in part on the testimony of Lake's own witnesses at the hearing. In addition to the testimony about the pay rates, Lake's comptroller testified that the numbers on the Payroll Data Sheets which appear to be some kind of code represent particular job numbers. (Tr.197-200). Meli stated that each employee's wages would be costed to a specific job number such as 1159 or 1164. Each of those numbers would refer to a specific job. (Tr.199). The job numbers would show during any particular time period what specific jobs a given employee had worked on. (Tr.200). The Payroll Data Sheet itself does not contain information sufficient to know which number corresponds to which particular job, but that information exists. (Tr.200). Lucey also initially testified

that the payroll reports would show who worked on which particular job (Tr.419-20), and that the job numbers on the payroll records would show that information. (Tr.421-23). He knew from memory a couple of the job numbers (Tr.423); for example he identified Job 1095 as a job with some steel work for the New York State Department of Transportation. Job number 1123 was also identified as a state job. (Tr.423). When he was asked why, if these payroll records enabled him to tell exactly who worked on what jobs, he did not provide the names of contract workers in response to discovery requests, Lucey backtracked and said the information "might" be on the payroll reports but he didn't know if it was because he didn't look at every payroll report. (Tr.449-50).

3. Sanctions

Examining the record as a whole, including the live testimony taken at the evidentiary hearing, I am persuaded that Lake's earlier failure to provide meaningful answers to discovery requests frustrated complainants' ability to prepare for hearing. Had timely and complete responses been made, complainants would have had an opportunity to interview or depose not only any alleged contract iron workers, but also the other persons sponsored by Lake for alien employment certification, representatives from alleged subcontractor Lake Steel or from Local 40 (whose identities were not even disclosed until the hearing) or other illegal aliens employed by Lake, and to have obtained evidence such as the number and amounts of deposits credited to Local 40's pension fund from Lake and for whom the deposits were made, documents submitted to the Department of Labor in support of the other applications for labor certification, or other documentary evidence.

OCAHO rules provide that if a party fails to comply with an order compelling discovery the administrative law judge may take any of the following actions:

> (1) Infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;
>
> (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;
>
> (3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense.
>
> (4) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

> (5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

28 C.F.R. § 68.23(c)(1), (2), (3), (4), and (5).

The range of sanctions available in OCAHO proceedings is limited to the procedural sanctions set forth in these rules. United States v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 274, at 1779-80 (1990) (Action by the Chief Administrative Hearing Officer vacating the Administrative Law Judge's Decision and Order), United States v. Ulysses, Inc., 2 OCAHO 390, at 735-36 (1991). That range of possible sanctions is considerably narrower than that available under the Federal Rules of Civil Procedure. I have no authority, for example, to impose monetary sanctions.

Were I to be guided solely by the norm of proportionality, I would not hesitate in view of the degree of prejudice to the moving party's preparation for hearing to exclude evidence of Lake's defense. Sanctions are intended not only for purposes of deterrence, but also to ensure that a party does not benefit from a failure to comply. Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994). Precluding evidence of or striking the defense would accomplish that goal and many courts have resorted to these harsh sanctions under analogous circumstances. See, e.g., Starbrite Waterproofing Co. v. AIM Constr. & Contracting Corp., 164 F.R.D. 378, 381-82 (S.D.N.Y. 1996) (striking the answer). Oy v. Weiss, No. CV-87 2002, 1989 WL 20594, at *3 (E.D.N.Y. March 2, 1989) (striking the defense).

Nevertheless, a party's loss of the right to contest a matter on the merits is not to be treated lightly. O'Bryant v. Allstate Ins. Co., 107 F.R.D. 45, 48 (D. Conn. 1985). My hesitation in imposing the sanction of preclusion stems only from a strong preference that cases be decided on the merits, Callwood v. Zurita, 158 F.R.D. 359, 361 (D. V.I. 1994), coupled with a concern for the constitutional limitations on sanctions, see 8A Charles Alan Wright, et al., Federal Practice & Procedure § 2264, at 578 (2d ed. 1994).

In view of the foregoing, I have inferred and concluded pursuant to 28 C.F.R. § 68.23(c)(1) that the answers to Interrogatories 7, 8, 14, and 15 and the documents responsive to Requests No. 7, 14, 15, and 18 would have been adverse to Lake. I further find that candid and complete responses would have led Local 455 to the discovery of witnesses with personal knowledge who might have been interviewed or deposed, and to other relevant evidence the lack of which has prejudiced complainants' ability to conduct a meaningful cross-examination related to Lake's claimed affirmative defense. Therefore, pursuant to 28 C.F.R. § 68.23(c)(2), I find that the matters concerning which the order was issued are established as follows:

With respect to Interrogatories Nos. 7 and 8 and Requests for Production Nos. 7, 14, and 18, I conclude that if answered candidly and completely the responsive answers and documents would have shown the identity of many of Lake's employees who were undocumented workers and that Lake's

previous attempts to obtain labor certification were also made on behalf of undocumented workers. With respect to Interrogatories Nos. 14 and 15 and Request for Production No. 15, I conclude that candid and complete answers would have shown that Lake had no significant number of contract iron workers for any extended duration during the relevant time period, that Lake continued to perform iron work with its own employees, and that accurate comparison pay rates would have demonstrated that Jose Hermo's pay rate was higher than that of most of Lake's construction workers. I have drawn these particular inferences because 1) there is a nexus between the proposed inference and the information contained in the withheld evidence, see, e.g., Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 921 (2d Cir. 1981), and 2) other circumstantial evidence supports the facts to be inferred. Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 217-18 (1st Cir. 1982).

While OCAHO rules clearly permit me to bar any evidence to the contrary, 28 C.F.R. § 68.23(c)(3), or even to strike Lake's alleged affirmative defense and answer, § 68.23(c)(5), I did neither. I find rather that the matters are established in complainant's favor subject to Lake's opportunity to establish otherwise by persuasive evidence. In reaching this result I have tried to put the parties in the same relative positions they would have been in but for the noncomplying party's failure. The general rule is that the burdens of production and proof lie where the pleadings place them. When this approach results in placing the burden upon a party which is unable to meet it because of the other party's failure to comply with legitimate discovery requests, it is appropriate to shift that burden to the noncomplying party. See generally Welsh v. United States, 844 F.2d 1239, 1245 (6th Cir. 1988). Where the noncomplying party already has the burden of proof, as with an affirmative defense, it is appropriate to find the issue to be established as a rebuttable presumption in favor of the opposing party. This is a less drastic sanction than striking a defense altogether, but ensures that the defense will not be established by default solely on the uncorroborated testimony of the noncomplying party.

D. Respondent's Request to Withdraw Admission No. 37

Respondent's Admission No. 37 was an admission that CX2, the letter of August 23, 1994 signed by Manuel Tobio, was authentic and genuine and its contents were true. At the close of the first day of hearing, when complainant indicated an intent to introduce into evidence the responses to its first requests for admissions (CX17), respondent's counsel stated that maybe he had overlooked the words "and the contents are true" when admitting Request No. 37. (Tr.275). While no motion was made to withdraw the admission, it was suggested that the admission should not be credited. An objection was subsequently lodged the following day when CX17 was moved into evidence on the grounds that the response to admission No. 37 was "clearly erroneous." (Tr.360). CX17 was admitted over this objection. (Tr.361).

OCAHO rules provide that any matter admitted pursuant to a request for admission is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission. 8 C.F.R. § 68.21(d). The language of the rule plainly implies that a formal motion is a prerequisite to obtaining relief. Absent a formal motion it is not clear that evidence contrary to the admission should even be considered. See, e.g., Shakman v. Democratic Org. of Cook County, 481

F. Supp. 1315, 1346 n.35 (N.D. Ill. 1979), vacated on other grounds sub nom. Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), cert. denied, 484 U.S. 1065 (1988).

As the Seventh Circuit has explained, judicial admissions are binding on the party making them and are not to be controverted at trial or on appeal. Keller v. United States, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). In contrast to an evidentiary admission, a judicial admission is not evidence at all, but rather has the effect of withdrawing a fact from contention. A judicial admission is conclusive, while an evidentiary admission is, as its name implies, simply evidence, the validity, weight, and probative value of which the trier of fact is free to assess. Cf. Guadagno v. Wallack Ader Levithan Assocs., 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997). The OCAHO rule does not set out specific guidelines for determining when or whether to allow withdrawal or amendment of an admission; accordingly I follow the general guidance provided by the Federal Rules of Civil Procedure in accordance with 28 C.F.R. § 68.1.[18]

The purpose for making an admission conclusive is to secure its binding effect so that a party may safely rely upon it without prejudice in preparing for trial. 8A Wright et al., Federal Practice & Procedure § 2264, at 574; see also Coca Cola Bottling Co. of Shreveport, Inc. v. Coca Cola Co., 123 F.R.D. 97, 102 (D. Del. 1988) ("Unless the party securing an admission can depend upon its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.").

For this reason a party seeking to avoid the force of an admission at trial is in a more difficult position than a party seeking the same relief at an earlier stage of the proceedings. American Auto. Ass'n. v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991) (once trial has begun, court may not permit withdrawal or amendment except to prevent "manifest injustice"); 999 v. C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985) (once trial begins there is a more restrictive standard for permitting withdrawal or amendment); Brook Village N. Assocs. v. General Elec. Co., 686 F.2d 66, 72 (1st Cir. 1982) (court is not free to permit amendment by default after trial merely because the parties present conflicting evidence touching on matters governed by the admissions); United States v. Lemons, 125 F. Supp. 686, 690 (D. Ark. 1954) (prejudice results to opposing party if admission is permitted to be withdrawn during the course of trial).

The Second Circuit, in which this case was heard, has indicated that withdrawal of an admission is a matter of judicial discretion, and may be permitted only when presentation on the merits will be subserved and no prejudice to the party obtaining the admission will result. Donovan v. Carls Drug Co., 703 F.2d 650, 651-52 (2d Cir. 1983). In considering whether presentation on the merits will be served, one of the principal questions to be asked is whether the admission is contrary to the record of the case. Coca Cola Bottling Co. of Shreveport, 123 F.R.D. at 103. Accordingly, I did not exclude

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[18] 28 C.F.R. § 68.1 provides, inter alia, that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation."

any evidence purporting to contradict the admission, but rather heard that evidence in order to make a finding whether or not the admission was "clearly erroneous" as alleged or was contrary to the record.

I find most of CX2 to be supported by at least some corroborative documentary or other evidence. Lake's status as a general contractor with approximately 50 employees on the payroll is not disputed. That its gross revenue for 1992 and 1993 was $7 million each year was confirmed, albeit reluctantly, by Lucey's own testimony. (Tr.311-12). Lake's own business brochure (CX10) contains numerous examples demonstrating that it works with ornamental, ornate cast iron products. That one other employee holds the specialized job is confirmed by Lake's having filed a previous application for labor certification for another welder less than six months before. (CX15). Lake has never offered any explanation as to why, if it had no iron work, it filed two applications for labor certification for welders within a six-month period. The second application was filed in February 1994 while the first, which remained open until August 1994, was still pending at the Department of Labor. Lake obviously had enough business to guarantee employment for Hermo for the following year because he remained employed not only for the following year but continuously to the present. There was no showing that any other employee was laid off in the following year either.

Lake has never articulated precisely in what manner it claims RCRFA1 No. 37 to be "clearly erroneous." Based on the evidence I do not find the contents of CX2 to be "clearly erroneous" or contrary to the record. I am persuaded neither that presentation on the merits would be served by, nor that prejudice would not result from, withdrawal of the admission and I decline to permit it.

VI. APPLICABLE LAW

The analytical point of departure for analysis of citizenship discrimination under IRCA is to be found in the case law developed under Title VII disparate treatment jurisprudence. United States v. Marcel Watch Corp., 1 OCAHO 143, at 1001, amended by 1 OCAHO 169 (1990). As was observed in Marcel Watch:

> Employment discrimination jurisprudence turns on the basic question whether an employer who intentionally treats persons differently on a prohibited basis violates anti-discrimination laws, regardless of what motivates that intent. Disparate treatment exists when an employer intentionally treats some people less favorable (sic) than others because of their group status.

Id. (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

In a long line of cases beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and further elaborated in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court has developed the framework for disparate treatment analysis. The same basic analysis has been applied to analogous cases, including those arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1994), Gallo v. Prudential Residential Servs., 22 F.3d 1219 (2d

Cir. 1994), and the Employee Retirement Insurance Act (ERISA), 29 U.S.C. § 1001 et seq. (1994), Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988).

A prima facie case of discrimination is established by evidence that the complaining party was treated less favorably than a comparable person not in the protected class under circumstances from which an inference of discriminatory intent may be drawn. Once a prima facie case is shown, the burden of production then shifts to the employer to articulate a nondiscriminatory reason for the challenged employment decision. Luciano v. Olsten Corp., 110 F.3d 210, 215 (2d Cir. 1997). The defendant's obligation is to produce evidence which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. The explanation must be legitimate, clear, specific and non-discriminatory. Holt v. KMI-Continental, Inc., 95 F.3d 123, 129 (2d Cir. 1996), cert. denied, __U.S.__, 117 S.Ct. 1819 (1997). "The employer's defense must . . . be designed to meet the prima facie case . . . ." Teamsters, 431 U.S. at 360 n.46, and must be sufficient on its face to rebut or dispel the inference of discrimination. Loeb v. Textron, Inc., 600 F.2d 1003, 1011 n.5 (1st Cir. 1979). The employer's proffered reason must be one which, "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Burdine, 450 U.S. at 255). The burden does not shift back if the reason doesn't contradict the prima facie case.

As observed in Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985):

> Placing this burden of production on the employer serves a dual purpose. First, it enables the employer, by proffering legitimate reasons for the alleged discriminatory [act], to rebut the inference of discrimination that arises from proof of the prima facie case. In addition, the burden of production frames the factual issue with sufficient clarity to afford the employee a full and fair opportunity to demonstrate pretext. To this end, the employer's explanation of its reasons must be clear and specific. Were vague or conclusory averments of good faith sufficient to satisfy the employer's burden, Title VII employees seeking to demonstrate pretext would be unfairly handicapped.

Id. at 996-97 (citations omitted).

Despite the shifting of the burden of production, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated remains at all times with the plaintiff. Burdine, 450 U.S. at 253. The burden may be satisfied by persuading the court that a discriminatory reason more likely motivated the employer or by showing that the employer's proffered explanation is unworthy of credence. Id. at 256. Disbelief of the reason put forward, particularly if disbelief is accompanied by a suspicion of mendacity, may be sufficient together with the prima facie case to meet the complainants' burden. St. Mary's Honor Ctr., 509 U.S. at 511.

The McDonnell Douglas/Burdine analytical framework is not to be applied mechanistically and should not cause the trier of fact to lose sight of the ultimate issue of whether the complainants sustained the burden of proving that the respondent intentionally discriminated against them. United States v. Lasa Mktg. Firms, 1 OCAHO 141, at 959-60 (1990) (amended decision and order) (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983)).

An employer knowingly and intentionally discriminates on a prohibited basis if it deliberately treats a job applicant differently on the basis of the applicant's citizenship status regardless of the employer's motivation for the discrimination. United States v. General Dynamics Corp., 3 OCAHO 517, at 39 (1993) (citing United States v. San Diego Semiconductor, 2 OCAHO 314, at 110 (1991)). The complainant must prove only that the discriminatory conduct was deliberate, not that the conduct was intended to violate the statute. Nguyen v. ADT Eng'g, 3 OCAHO 489, at 8 (1993), United States v. Buckingham Ltd. Partnership, 1 OCAHO 151, at 1069 (1990) ("it is not intent to violate the law that is at issue but intent to perform an act for which the law has prescribed consequences. . . ."). Proof of discriminatory motive is critical but can in some situations be inferred from differences in treatment. Teamsters, 431 U.S. at 335 n.15. It frequently will rest on the cumulative weight of circumstantial evidence. Luciano, 110 F.3d at 215.

Discrimination in hiring refers not only to the failure to hire, but also to the failure to consider for hire. That the whole employment process is implicated is well established in OCAHO jurisprudence. See, e.g. Lasa Mktg. Firms, 1 OCAHO 141, at 971 n.21:

> I intend to interpret and apply § 1324b(a) in a way that considers broadly the totality of the circumstances of the employment *process*, and to scrutinize each employment decision within that process for unfair immigration-related employment practices. In this regard, I intend my analysis to be guided in part by the distinction, mentioned above, between the "nullification" of employment opportunities and, what I will incorporate by reference as being the *substantial impairment* of such opportunities for reasons prohibited by section 1324b(a). Thus, as applied to the case at bar, it is my view that even if I did not find that Respondent actually failed or refused to refer [the complainant] for employment, I would nevertheless find that the active discouragement, based solely on citizenship status, of her attempt to apply for the cashier position was a substantial impairment of her protected right to be considered with respect to such employment, and therefore constituted an "unfair immigration-related employment practice" within the prohibited purview of section 1324b(a).

Cf. Ostroff v. Employment Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982) (summary rejection of an applicant prior to considering applicant's qualifications may amount to discrimination under appropriate circumstances); Nanty v. Barrows Co., 660 F.2d 1327, 1331-32 (9th Cir. 1981) (same).

In Price Waterhouse v. Hopkins, 490 U.S. 228, 246-47 (1989), a plurality of the Supreme Court found that the McDonnell Douglas/Burdine analysis does not apply where the employment decision was the product of both legitimate and illegitimate motives. In such a case, once it has been shown to be

more likely than not that the protected characteristic played a motivating part in the decision, the employer must prove by way of an affirmative defense that the decision would have been the same even if the characteristic had played no role. Id. at 243-47. Cf. Zaken v. Boerer, 964 F.2d 1319, 1325 (2d Cir.), cert. denied, 506 U.S. 975 (1992).

VII. DISCUSSION AND ANALYSIS

At the close of complainants' case, Lake moved to dismiss based on the grounds that complainant had failed to state a prima facie case. (Tr.584). I denied this motion and found based on the evidence that complainants had shown that they applied for and were qualified for a job at Lake and that they were rejected under circumstances giving rise to an inference of discrimination. The burden of production then shifted to Lake to set forth a legitimate nondiscriminatory reason for its refusal to hire or consider the complainants. Complainants then had the opportunity to show that the proffered reason either had no basis in fact, did not actually motivate the respondent, or was insufficient to justify the failure to consider them. It is now necessary to consider the ultimate question of whether the complainants carried their burden of showing that Lake knowingly and intentionally discriminated against them, and, if so, whether Lake established an affirmative defense.

A. Whether a Legitimate Non-Discriminatory Reason was Given for the Employment Decision

In order to answer the first question, it is necessary to examine the various reasons put forth to explain why the complainants were not considered or hired.

1. The Explanation Given to the Department of Labor

The first explanation in the record for Lake's failure to hire the complainants is one which Lake seeks to repudiate. It is that contained in documents filed with the Department of Labor in support of Lake's application for labor certification. (RX1,2,3, and 6). These documents represent that the job was posted on Lake's trucks and office windows from November 21, 1994 until December 22, 1994, that Helder Joseph Rocha was hired on December 6, 1994, and that he worked only one day and didn't come back. It is also represented that Anderson, Borkowski, DeSimone, Giarusso, Graham, and Mansmann were rejected because they failed to meet the language requirement, that Barbosa applied December 19, 1994 but was not called because he spoke Brasilian rather than Portuguese and his jobs could not be verified, and that even though Barreiro applied after the recruitment period was over, unsuccessful attempts were made to call him on December 20 and 21.

Lake does not attempt to defend this explanation but asserts instead that the signatures on those documents purporting to be Tobio's signature are forgeries, that Lake had nothing to do with the language requirement or with the scheduling of any interviews, that the only documents signed by Lake agents were the certification application itself and one other document, and that Dulce Cuco was without authority to act on Lake's behalf. While Lake never really came out and said that the representations in these documents were false, the events described appear to have no basis in fact.

The documents appear instead to have been designed to create the appearance of having complied with the regulatory requirements for the labor certification process without in reality engaging in good faith recruitment for U.S. workers. The job description appears to be tailored to fit Hermo, and the foreign language requirement to be a device for screening out other applicants. Tobio denied even knowing, much less hiring, anyone named Helder Joseph Rocha (Tr.298). I credit that Tobio did not prepare or sign RX1,2,3, or 6 and that he may well have been unaware of the specific factual assertions contained in those filings. The evidence indicates that they were prepared and filed by Dulce Cuco. Whether Lake is responsible for them is a different question, but the explanation they offer is clearly pretextual and Lake does not suggest otherwise.

2. Doing a Favor for Hermo

Lake argues instead that its real reason for not considering the complainants had nothing to do with them personally because Lake only participated in the labor certification process as a favor for Hermo, in an effort to help him get a green card and obtain legal status in the United States. Lake does not contend, and explicitly denied, that there were any reasons of nepotism or friendship for this decision: Hermo is not a cousin or other relative or a friend of another employee or manager. (Tr.295-96). He was not recommended by anyone, but was a walk-in hire. (Tr.295-96).

Wanting to do a favor for an illegal alien employee is, of course, not a legitimate, non-discriminatory reason at all; employing undocumented workers is unlawful even when there have been no applications from lawful workers. Far from dispelling an inference of discrimination, this explanation strengthens such an inference because a commitment to a pre-selected candidate necessarily involves an intent not to consider any other applicants. Lake has insisted that it did not intend to authorize any interviews by signing the initiating documents. Lake in essence admits that it never intended to consider anyone but Hermo.

While pre-selection in itself is not necessarily unlawful, it nevertheless may operate to discredit an employer's proffered explanation, Goostree v. Tennessee, 796 F.2d 854, 861 (6th Cir. 1986), cert. denied, 480 U.S. 918 (1987), or serve as relevant evidence of whether the employer's motivation was legal. Terry v. Gallegos, 926 F. Supp. 679, 712 (W.D. Tenn. 1996). That Lake wanted to help an illegal alien employee is not sufficient justification for refusing to consider qualified United States citizens for employment. Congressionally mandated public policy choices enacted by IRCA address two immigration problems: § 1324a imposes sanctions against employers who knowingly employ aliens not authorized to work in the United States, while
§ 1324b prohibits citizenship status or national origin discrimination in hiring for employment. In light of these statutory provisions, it is doubtful that there could ever be a legally permissible non-discriminatory reason for choosing to employ an illegal alien in preference to qualified United States citizens.

This case differs from the usual employment discrimination case in which a balance must be struck between employee rights and traditional employer prerogatives to choose freely among qualified candidates, see, e.g., McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995), Price

Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989). No issues of management prerogatives are posed here because there is no management prerogative to prefer, or even to hire, an illegal alien. That practice is itself unlawful.

3. The Complainants are Overqualified

Lake's next line of explanation is that the complainants are too skilled for the job which Hermo is performing. In fact, says Lake, Hermo is doing unskilled work and the claimants would not be willing to do unskilled work. The focus at the liability stage in a hiring case is on the employer's motivation at the time of the decision, not on whether the applicant would have taken the job. Hermo's specific job assignments subsequent to the employment decision are similarly not relevant to the liability issue.

A respondent's obligation is to articulate a legitimate non-discriminatory reason for the action it actually took, not an explanation for the action it might have taken had it considered the applications, or speculation as to what the applicants would or would not have done. It is well settled that an employer who never considered the qualifications of the applicant may not defend a hiring decision based on those qualifications. Nanty v. Barrows Co., 660 F.2d 1327, 1332 (9th Cir. 1981) (where plaintiff was summarily rejected for job, employer's arguments explaining why plaintiff would not have been hired had he been considered "are simply not relevant [in determining liability], since none explains the reason for [plaintiff's] rejection"). Cf. Ostroff v. Employment Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982). In Jindal v. New York State Office of Mental Health, 728 F. Supp. 1072, 1077-78 (S.D.N.Y. 1990), it was similarly held that an employer does not articulate a nondiscriminatory reason for failure to promote by showing that the employee was not considered. (citing Cowan v. Prudential Ins. Co. of America, 852 F.2d 688, 691-92 (2d Cir. 1988) (as a factual finding, a failure to consider at all undermines the employer's ability to rebut a prima facie case)). The "explanation" is not an explanation at all because the complainants' qualifications were not the motivation for Lake's failure to consider them. Cf. Turnes v. AmSouth Bank, 36 F.3d 1057, 1061-62 (11th Cir. 1994) (employer may not meet intermediate burden with hypothetical justification; where defendant did not know of or consider plaintiff's credit history at time the decision was made, credit history does not provide a legitimate nondiscriminatory reason).

4. Lake Does Not Hire Union Members

Finally, Lake's post hearing brief argues that because it is a non-union shop it would not, in any event, have hired any of the complainants because they are members of a labor union. This explanation arose late in the proceeding, and may be related to the testimony of one of the claimants both at the hearing and at his deposition that he believed the reason he wasn't hired was because of his union affiliation. (Tr.62).

This, of course, was not Lake's real reason for not considering or hiring the complainants and Lake's witnesses did not suggest that it was. Lake's witnesses said they could not recall ever seeing the resumes or applications. Although George Lucey testified that Lake does not hire union workers (Tr.439-40), he did not say that their union affiliation had anything to do with the failure to consider the complainants.[19] The suggestion that Lake does not hire union members is also inconsistent with the entry on Lake's payroll records for the period ending January 19, 1997 which explains a variant pay rate for Walter Free with the notation "[t]his is a different union." In any event, an employer can rely on a nondiscriminatory justification only if that justification actually motivated it at the time of the decision. Price Waterhouse, 490 U.S. at 252. Again, this is not an explanation of why Lake failed to consider the applications, it is an explanation of what Lake might have done if it had considered them.

The "wouldn't have hired anyway" defense may be relevant to whether the remedy of compelled hiring is appropriate. Whether or not each individual complainant should be hired or receive back pay, however, is a separate question from whether or not they were discriminated against. Lake's suggestion confuses issues of remedy with issues of violation. These are two separate issues; the first deals with whether the statute has been violated; the second (which becomes relevant only if the violation is proved) involves the remedy--whether compelled hiring, back pay, or other remedies are appropriate. See generally Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995). The complainants' union membership was not the reason for Lake's failure to consider them.

The first proffered reason thus has no basis in fact, the second is insufficient to justify the failure to consider the complainants, and the third and fourth did not actually motivate the respondent. Lake did not put forth an adequate explanation for its failure to consider the complainants. Alternatively, if it did, those reasons put forth have been shown to be pretextual or insufficient.

Notwithstanding Lake's failure to present an acceptable justification, the ultimate burden of persuading the trier of fact remains at all times on the complainants. Hargett v. National Westminster Bank, USA, 78 F.3d 836, 838 (2d Cir.), cert. denied, ___U.S.___, 117 S.Ct. 84 (1996).

B. Whether Complainants Established Intentional Discrimination

That no one at Lake signed RX1,2,3, or 6, does not mean that Lake bears no responsibility for what transpired in the labor certification process. Lake admitted that it agreed to sponsor Hermo and initiated or consented to the initiation of the process. Lake's Vice President, Manuel Tobio acknowledged that he signed both the application for labor certification (CX1), as well as the narrative statement on Lake stationery describing Lake's operations. (CX2). While Lake now claims that Tobio did not know what he was signing, there has been no assertion that Tobio's signature on those two documents was obtained by fraud or misrepresentation or that Tobio was unaware of their nature

[19] It is well established that an "articulated" reason not admitted into evidence will not suffice. A defendant cannot meet the burden of production by argument of counsel. Burdine, 450 U.S. at 256 n.9.

and purpose, whether he read them in detail or not. Whatever mental reservations Tobio now claims, he knew that he was signing documents which committed Lake to the sponsorship of Hermo for labor certification. He did not sign the documents by mistake or accident. Although Lake attempts to portray Tobio as ignorant, semi-literate and no more than a first line field supervisor, other evidence shows that Tobio has been in the United States for 33 years, is an expert in heavy steel and concrete construction and has been the manager of major complex construction projects from Maine to Texas. (CX10G). He is not only the Vice President of Lake, but also an owner and Vice President of other business organizations as well. His W-2 for 1995 shows that Lake paid him a salary that year in excess of $129,000.00. (CX14). I do not credit that he is a first line field supervisor. He is an officer and owner of Lake and has actual power to bind the company.

The application he signed designated Dulce Cuco as the employer's agent and expressly took responsibility for her representations. The Lake letterhead stationery on which CX2 appears was provided to Hermo by Manuel Tobio at the request of Dulce Cuco for the express purpose of providing information about the company in connection with the labor certification application. He asked Hermo what it was for and Hermo told him. (Tr.623). No explanation has ever been offered or even hypothesized as to how Dulce Cuco could have obtained the information about the company if not from someone at Lake. Hermo testified that Cuco asked him no questions about the company. Hermo didn't even know its gross revenues and neither did Tobio. Tobio thought that only Meli or Lucey would know that. Where or how Cuco would have found out all the information she had about Lake's employees or its revenues is simply unexplained. Also unexplained is the more critical question of what could have caused Dulce Cuco to telephone Anthony Rosaci on December 7, 1994 in response to his letter of November 22 and the accompanying resumes which had been sent to Lake, and only to Lake. Although neither Lucey nor Tobio could recall seeing the resumes (Tr.444-45, 239-40), they were sent to Lake's office by certified mail and were signed for by the bookkeeper who works in Lake's office. Shortly thereafter Cuco called Rosaci in direct response to Rosaci's letter. She identified herself to Rosaci as representing Lake. She had information about the complainants which appears on RX3 which could only have come from communications sent to Lake.

Lake nevertheless argues in its post hearing brief that even though Tobio signed the designation of agent it should not be held accountable for Dulce Cuco's acts because Cuco was acting ultra vires. An agency relationship was not established because Tobio didn't read the form and Lake never authorized any of her actions. It should first be noted that courts have generally been unmoved by arguments that signers of similar documents either didn't read or didn't understand them. In United States v. Puente, 982 F.2d 156 (5th Cir.), cert. denied, 508 U.S. 962 (1993), it was held that a defendant who testified that he never read a HUD form and that he signed it without reading it had acted with "'a reckless disregard of the truth and with the purpose to avoid learning the truth.'" Puente, 982 F.2d at 159 (citing United States v. Tamargo, 637 F.2d 346, 351 (5th Cir.), cert. denied, 454 U.S. 824 (1981)). Cf. United States v. Obiuwevbi, 962 F.2d 1236, 1239 (7th Cir. 1992) (defendant claimed he did not understand English well).

Moreover, whether or not Cuco met all the strict requirements of New York agency law is not the real issue. It is clear that Lake intended the person helping Hermo with the paperwork to have at least apparent, if not real, authority: it authorized Cuco to initiate the process it now seeks to dissociate itself from. Cf. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570-71 (1982). Lake's conduct was such that reasonably interpreted would cause third persons to believe that the agent acted with authority. In Cabrera v. Jakabovitz, 24 F.3d 372, 387 (2d Cir.), cert. denied, 513 U.S. 876 (1994), the court found ample evidence of an agency relationship where the landlords had manifested the desire to have the company act by providing the company with listings of apartments and criteria for tenants. Here Lake similarly manifested an intent by signing the application and furnishing letterhead for and signing the narrative statement about its operations. (CX2). During the period from the filing of the application until December 1994, five letters from the Department of Labor, two addressed to Anthony Rosaci and three addressed to Susan Di Nicola, indicated that copies had been sent to Manuel Tobio. (Tr.233-40, 260-61). He denied seeing any of them. Despite this series of communications, copies of which were sent to Lake from the Department of Labor during the processing of the application, no one at Lake withdrew the application or notified the Department of Labor that Di Nicola or Cuco was without authority.

I need not, however, reach the question of agency at all. Even if the Cuco documents are totally ignored, this does not relieve Lake of responsibility for the documents which Tobio himself signed. Lake's posthearing brief argues with respect to any misrepresentations in the labor certification process that any rights based on the execution of the application are rights of the Department of Labor, "to whom the agency declaration was made and intended vis-a-vis 18 U.S.C. § 1001 (which appears prominently on the front of the application) and not upon the Complainants."

It is undoubtedly true that 18 U.S.C. § 1001 creates no rights for the complainants. Like 28 U.S.C. § 1746, pursuant to which Tobio's signature is affixed, 18 U.S.C. § 1001 is a criminal statute. The enforcement of criminal statutes is committed to entities other than the complainants, the Department of Labor, or this forum. Of course I do not have authority to rule on fraud in the labor certification process. Cf. United States v. McDonnell Douglas, 2 OCAHO 351, at 373 (1991), and I do not presume to do so. See also United States v. General Dynamics Corp., 3 OCAHO 517, at 57 (1993). The issue here is not whether Lake attempted to defraud the Department of Labor. It is whether Lake exercised a preference for employing an illegal alien instead of United States citizens. This case does not arise under 18 U.S.C. § 1001 but under IRCA's prohibition of citizenship discrimination: 8 U.S.C. § 1324b addresses precisely this issue. Whether there is an implied private right of action independent of 1324b against an employer arising out of use of the labor certification process to hire illegal aliens in preference to lawful United States workers is similarly not the issue in this case.[20] The labor

[20] Garrison v. Ock Constr. Ltd., 864 F. Supp 134 (D. Guam 1993) sets forth in detail the two conflicting lines of cases in the lower courts addressing this question. It should also be noted that in DeCanas v. Bica, 424 U.S. 351 (1976), where California had enacted legislation to regulate the employment of illegal aliens long before Congress chose to do so, the Supreme Court upheld the right

(continued...)

certification process, when all is said and done, was simply the vehicle by which the documentary evidence of Lake's activities came to light. Lake furnished so few documents in discovery that most of the evidence documenting its activities and employment choice necessarily came from Labor Department records. The fact that I have no authority to rule on the issues involved in the labor certification does not mean that Lake is free to cast aside its own representations made under oath simply because it has become convenient to do so.

This was the second application Lake filed for labor certification for a welder within a six-month period. Lake was generally aware that such an application involved representations that it looked for United States workers. Lucey testified that the process was for someone "we can't find in the states that has that type of trade." (Tr.349). Lake's initial application makes representations that the job had been advertised in the Star Ledger and the local paper, and that the ones who applied were illegal, didn't have the experience, or didn't know how to weld iron into shapes. It further represents that the job opportunity has been and is clearly open to any qualified United States workers and does not involve unlawful discrimination.

Lake's testimonial posture is basically irreconcilable with the documentary evidence. Lake accordingly attempts to discredit or explain away that evidence. I am asked, in essence, to disregard Lake's sworn representations to the Department of Labor because Tobio didn't understand what he was signing; to disregard CX2 despite Lake's admission that it is authentic and genuine and the contents are true, because the admission was inadvertent and "clearly erroneous;" to disregard the notice of wage violation because the Department of Labor misclassified employees who weren't really ironworkers; to disregard RX3 because Tobio didn't sign it and Lake has no idea how information about the complainants got to Cuco; to disregard the Notice of Findings by the Department of Labor because no one remembers seeing it (although it was produced by Lake in discovery); to disregard the fact that Lake had applied for another alien labor certification for a welder less than six months before filing the subject application because no one at Lake could remember anything about it; and to credit that Lake pays an illegal alien in excess of $35,000.00 a year to push a wheelbarrow. The cumulative weight of these inconsistencies, contradictions, and implausibilities undermines the credibility of Lake's representations.

It is more likely than not that Lake knew from the inception of Hermo's employment that he was not lawfully entitled to work at Lake. At the very least, Lake knew when Hermo asked Tobio for sponsorship for a green card that Hermo did not have a green card and was not lawfully entitled to be employed by Lake, or indeed by any other employer in the United States. Participation in the alien labor certification process requires a good faith search for United States workers and a representation to the Department of Labor that no such workers are available. Lake made such a representation. At

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[20](...continued)
of migrant farm workers to challenge labor contractors' hiring of illegal aliens, noting that "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs." DeCanas, 424 U.S. at 356-57.

the same time, it never intended to search for or to hire other applicants because it wished to continue to employ a person not lawfully entitled to work in the United States at all.

That proof of a preference for unauthorized alien workers over qualified United States citizens may be evidence of discriminatory animus in refusing to hire United States citizens is recognized in OCAHO jurisprudence. Lardy v. United Airlines, Inc, 4 OCAHO 595, at 48 n.33 (1994).
The totality of the evidence in this case shows that Lake deliberately exercised just such a preference.

C. Whether Lake has Established an Affirmative Defense

Lake claims by way of affirmative defense that it had no need for an iron worker because all its major iron work was subcontracted out rather than performed by Lake's own workers. As a sanction for discovery violations, I found it established as a rebuttable presumption that Lake had no significant number of contract iron workers for any extended duration during the relevant time period, and that Lake continued to perform iron work with its own employees.

Lake's attempt to rebut that presumption rests largely on the uncorroborated testimony of George Lucey. There was no documentary evidence of any subcontract or of any payment to alleged subcontractors; no contract workers were specifically identified as such, and there was no evidence of any payment to a single contract worker. No other company witness corroborated Lucey's testimony about Lake's contracting out iron work. In fact, Tobio testified both that Lake did no iron work and that he didn't know whether it did iron work or not.

While Lucey made global claims of contracting out all the major iron work (Tr.336), the specific contract projects he described boiled down to four: the Bayonne Bridge job in 1992 (Tr.317-22), the New York side of the Alexander Hamilton Bridge in 1994 (Tr.329-33), the Gowanus Bridge (Tr.333), and the Harlem River railings in 1995. (Tr.334-35). Beyond that he said that there were numerous jobs with some steel or iron work, "too many to answer." (Tr.335). Even were I to find that the four specific projects Lucey identified were subcontracted out, that would not necessarily show that Lake was not also doing other iron work at the same time with its own workers, and other evidence indicates that it was.

Lucey appeared, moreover, to have his own idiosyncratic definition not only of what is major iron work but also of what is iron work at all. For example, he testified that the next "real ironwork" after Stuyvesant Square was on the Bayonne Bridge. (Tr.317, 326). He said that the Saratoga Bridge project was not an iron work job (Tr.327-28), but Lake's own brochure describes that job as structural repair and renovation of a steel truss bridge in Saratoga County, reriveting and replacing steel as needed. (CX10C). Lucey acknowledged that this job involved repair of the lower floor beams. (Tr.339, 344). Lake's brochure describes the project as involving "complete structural repair and renovation, replacing deteriorated underwater concrete piers and steel structures." (CX10I). Lucey testified that the prevailing wage violation involving 24 alleged iron workers occurred on this job, although it is not altogether clear that this was the case.

Lucey also testified initially that there was no steel work in the Coney Island project. (Tr.342). When his attention was called to the description of that project in Lake's brochure which states: "[b]eing accustomed to fabricating many varieties of railings and benches . . . in our own metal and wood shops, Lake constructed the thousands of feet of steel and aluminum rail and the hundreds of park benches" (CX10D), he said that steel was a misprint. (Tr.342). It was all aluminum. When asked whether aluminum was considered iron work, his response was "I would imagine so. I wouldn't, but it is." (Tr.342). He described the Thekla E. Johnson orchid terrarium as a limestone job (Tr.343), but Lake's brochure shows a photograph of a limestone and wrought iron orchid terrarium and rotunda, and referred in particular to the "delicately figured wrought-iron dome made in our own metal shop." (CX10N).

Some of the other metal work projects described in Lake's business brochure include a steel lattice fence and gazebo for the Peggy Rockefeller Rose Garden ("[t]his garden, designed by Beatrix Jones Ferrand in 1916, was realized by our craftsmen, who have the talents most think are a lost art. The wrought iron work was fabricated in our shops of galvanized cold rolled steel") (CX10B); fabrication of wrought iron work for the 1500 foot historic garden wall of the Commandant's residence at the United States Military Academy at West Point (CX10L); restoration of 1300 feet of cast-iron fencing for Stuyvesant Square Park (CX10M); numerous other bridge repair projects in and around New York City (CX10I); and a project in the Manhattan Plaza environs ("[o]ur artisans fabricated the iron and steel work, including the custom-designed lighting, in our metal shop.") (CX10K). For the state of New York alone the brochure states that nineteen bridges were rehabilitated including concrete, jacking, bearing restoration, expansion joints, and various steel repairs. (CX10I).

Lake argues that these projects were all completed before it started subcontracting out the iron work, and that more recently its jobs have been concrete and cement work. Lake's business brochure was completed in 1993. (Tr.346). Lucey suggested that the four loose leaf inserts in the back of the brochure (CX10O, P, Q, and R) are more representative of its recent work. (Tr.346). The inserts were probably completed in 1996. (Tr.347). They describe jobs Lake has just finished or has been working on. (Tr.346). The United Nations job (CX10O), for example, was completed in 1995-96. (Tr.346).

However, while Lucey discussed the part of the United Nations job which involved rebuilding all the flower beds (Tr.346-47), he made no reference to other parts of the job described in the brochure, such as the structural reworking of the bridging over FDR Drive and the construction of the wrought iron and wood outdoor seating: "[t]he outdoor seating, throughout the UN complex, was carefully constructed of wrought iron and enduring Bethabara wood. . . . The benches were installed along the promenade and newly created children's play areas." (CX10O).

Another of the recent inserts, "Creating New Faces for Old Friends" (CX10P) describes the restoration of city town houses and shows photographs prominently featuring decorative iron work in balconies and period windows. It describes a "multi-disciplined expertise and old world, trained artisans . . . using wrought iron and other sophisticated materials." Lake is listed in the blue book, a

contractor's specialty register, under historical restoration. (Tr.441). Lucey testified that you would refer to the blue book, for example, if you were looking for a contractor that did historic windows or doors. (Tr.441).

Lake's brochure notes elsewhere that "[w]e control all multi-disciplined work with our own experienced on-site managers, craftspeople and tradesmen, and we create custom detailing, from complex ironwork to period windows, in our own workshops." (CX10B). A photograph of Lake's principals inspecting work in the welding shop also appears in the brochure. (CX10S).

I found Lucey's uncorroborated testimony to be unreliable in a number of respects and sometimes contradicted by other evidence. His memory as to many events appeared to be both selective and inaccurate. For example, he was initially unable to remember Lake's gross revenues, but purported to recall the details of contract iron work jobs five years ago of which no records at all existed. He was unable to recall any information at all about the two other employees for whom Lake had previously sought labor certification in 1993 and 1994, one of whom was a welder, although he was the person who was directly involved with those applications. He never explained why, if Lake was not doing iron work, he had himself signed another certification application for another welder less than six months before the Hermo application. Some of Lucey's inaccuracies were tangential to the case, but significant insofar as they reflected upon the reliability of his testimony and his general credibility. For example, although he testified that Jose Tobio hadn't worked at Lake in five years (Tr.442-43), Jose Tobio's name appears the list of employees for 1994 and 1995 (CX20), and Lake evidently issued W-2 forms for him for 1994 and 1995. (CX14).[21] (Jose M. Tobio, who appears to be a different individual, is also on the list for 1996). Lucey said he did not believe Carl Tortorella worked in the office in 1994 (Tr.389), although he had previously identified Tortorella's signature on certified mail sent to Lake in November and December of 1994. He testified that the wage violation and the safety violations occurred on the same job in 1992 but the documents show that the safety violations occurred in 1993 at the office and the wage violations in 1991 in Washington County. He was unable to recall the Department of Labor findings, although they had been produced by Lake in discovery, and denied having any recollection of seeing any of the multiple communications sent to Lake either by Rosaci or by the Department of Labor.

VIII. FINDING OF LIABILITY

I find by a preponderance of the evidence that the respondent Lake discriminated against the complainants and each of them individually on the basis of their citizenship in violation of 8 U.S.C. § 1324b by failing and refusing to consider them for hire.

This is not a holding that every knowing hire of an illegal alien necessarily equates to an act of discrimination. Rather, this is a holding that under the circumstances present in this case it is more

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[21] Jose Tobio is also one of the employees the Labor Department found to be underpaid as iron workers. (CX13).

probable than not that discrimination occurred because Lake had no intention of considering United States citizens for employment as welders or ironworkers when it represented under oath to a federal agency that it had a legitimate job opening for which it was engaging in recruitment. Lake preferred to continue to employ an undocumented worker instead of hiring, recruiting, or even considering lawful workers. In so doing, Lake engaged in an unfair immigration-related employment practice.

IX. REMEDIES

Like other major anti-discrimination statutes, the non-discrimination provisions of the INA exist not only to vindicate the rights of employees, but also to eliminate the unlawful conduct of employers. Cf. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995). At the remedial stage it is thus necessary to bear in mind these twin objectives of deterrence and compensation. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Monetary awards are made not only to recompense individuals for injuries inflicted by discriminatory conduct, but also to deter illegal practices. Deterrence is best accomplished by attaching economic consequences to discriminatory acts because economic penalties may be a more powerful deterrent than is injunctive relief. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1239 n.32 (3d Cir. 1994), vacated on other grounds, 514 U.S. 1034 (1995).

A. Applicable Law

The remedial provisions of Title VII were expressly modeled on the analogous remedial provisions of the National Labor Relations Act (NLRA), Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982), so that cases decided under the NLRA as well as under Title VII are a useful guide to tailoring remedies in employment discrimination cases. Courts have emphasized the necessity of tailoring proposed remedies to the unfair practices they are intended to address.
In addition, it has been noted that a finding of violation is presumptive proof that some back pay is owed. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). This presumption in favor of back pay can seldom be overcome. Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 719 (1978) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)). Accord Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168, 1175-76 (2d Cir. 1988) (presumption of make whole relief).

If an employer is found upon the preponderance of the evidence to have engaged in an unfair immigration-related employment practice, IRCA mandates that the administrative law judge shall issue a cease and desist order. 8 U.S.C. § 1324b(g)(2)(A). Other remedies are discretionary with the judge. 8 U.S.C. § 1324b(g)(2)(B). Subsection B(i) authorizes an order to comply with the requirements of § 1324a(b) with respect to individuals hired during a period up to three years, while B(ii) authorizes a requirement that the employer retain the name and address of each individual who applies for work for three years for the purposes of § 1324a(b)(5). Subsection B(iii) authorizes a judge to direct that individuals adversely affected be hired, with or without back pay. OCAHO precedent establishes that hiring is not a condition precedent to the award of back pay. United States v. Mesa Airlines, 1 OCAHO 74, at 513 (1989), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991). Civil money

penalties are authorized by subsection B(iv), while B(v) and (vi) authorize requiring the discriminatory entity to post notices about employee rights and employer obligations and to educate personnel involved in hiring about the requirements of this section or section 1324a.

Three elements must be considered when making an award of back pay: the appropriate time period, the items to be included in the gross award, and the amounts by which an award may be reduced. See, e.g., United States v. A.J. Bart, Inc., 3 OCAHO 538, at 14-15 (1993). Case law makes clear that an aggrieved individual has a duty to mitigate damages by exercising reasonable diligence in seeking similar employment. Clarke v. Frank, 960 F.2d 1146, 1152 (2d Cir. 1992). The burden of proof of failure to mitigate or failure to exercise reasonable diligence rests with the employer. Greenway v. Buffalo Hilton Hotel, 951 F. Supp. 1039, 1059 (W.D.N.Y. 1997). Once the gross amount of back pay is determined, the burden shifts to the employer to prove what should be deducted as interim earnings, or as amounts earnable with reasonable diligence. EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 924 (S.D.N.Y. 1976), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977). This is the rule under the National Labor Relations Act as well. Mastro Plastics, 354 F.2d at 178-79.

B. Discussion

1. Prospective Relief

A cease and desist order is mandatory and will be issued. Lake will be required to comply with § 1324a(b) and to retain the name and address of each individual who applies for work for a period of two years. It will also be required to post notices advising employees of their rights and of employer obligations, and to educate personnel involved in hiring about the requirements of §§ 1324a and 1324b. In view of the fact that Lake has not yet ceased its unlawful conduct, the twin objectives of IRCA require no less.

With respect to other remedies, I note first that complainants are not entitled to relief which would put them in a better position than they would have been had there been no discrimination, Ultrasystems W. Constructors, Inc. v. NLRB, 18 F.3d 251, 258 (4th Cir. 1994). While there are six discriminatees, there is only one job at issue. Although this case was not denominated as a pattern and practice case, appropriate relief may be best analogized to the relief utilized in a pattern and practice hiring case, where the size of the class exceeds the number of positions and it is not possible to ascertain with certainty which of the applicants would have been hired. In such a situation, it is appropriate that the applications of the class members be dealt with on a preferential basis as compared to other applicants, but among the class the applicants should be considered on a first in line approach, either by date of application or some other arbitrary method. See generally Lex K. Larson, Employment Discrimination § 92.11 (2d ed. 1997).

The protected right which has been violated by Lake's discriminatory conduct here is not any one particular applicant's entitlement to the job, but rather each individual's right to equal, fair, and impartial consideration for employment. See, e.g., Mardell, 31 F.3d at 1232. This is what each has been

deprived of. Accordingly, I do not require Lake to hire any of the complainants. Rather, Lake will be required to give them meaningful consideration on a preferred basis. They must be considered fairly and may not be rejected except for reasons which are legitimate and job related.

Traditional Title VII jurisprudence is pervaded with concerns dealing with the impact of remedial measures on innocent incumbent employees or third parties. See, e.g., Ford Motor Co., 458 U.S. at 239, Manhart, 435 U.S. at 723; Colwell v. Suffolk County Police Dep't., 967 F. Supp. 1419, 1432-33 (E.D.N.Y. 1997). These concerns have no application in a case like this where there is no "innocent" incumbent because the incumbent employee has no lawful right to be employed and Lake has no lawful right to employ him.

Accordingly, Lake will be required to consider for hire without delay any complainant applying for work with Lake within the next thirty days. An applicant may be rejected only for neutral, job-related reasons. Lake's contention that there is no current job opening will be unavailing as a reason for rejection so long as it continues to employ the undocumented alien. Lake will also be required for a period of two years to notify Local 455 before hiring any additional construction workers in order to give other complainants an opportunity to apply at that time should they so wish.

2. Monetary Relief

Neither party fully developed the record with respect to the back pay issue. Retirement or pension benefits, medical insurance, lost social security contributions, and other fringe benefits were never quantified other than by Meli's testimony that Lake pays between $200.00 and $400.00 a month for each employee's medical insurance. (Tr.213). There was no evidence presented that any complainant had to buy substitute health insurance or incurred out-of-pocket medical costs which would have been covered by insurance. Cf. Miner v. Glenn Falls, 1992 WL 349668, at *11 (N.D.N.Y. 1992), aff'd, 999 F.2d 655 (2d Cir. 1992). Specific dates when each individual was working or on layoff were similarly not established by evidence in the record. With their post-hearing brief, complainants requested a post evidentiary hearing to determine a back pay remedy. However, it was made abundantly clear at the hearing that the parties were to submit at that time any evidence they wished to be considered; the proceedings were not bifurcated and the record has been closed. Once the record is closed it is inappropriate to receive additional factual information without reopening. Lussier v. Runyon, 50 F.3d 1103, 1105 (1st Cir. 1995). The parties will be held to their proof at the hearing, thus no additional evidence will be considered and there is no reason to delay the issuance of a final order. The back pay remedy will be established based on the record made by the parties, although that record is far from ideal. Ancillary proceedings will be conducted solely to deal with the question of attorneys fees.

a. Gross Back Pay

Ordinarily back pay is ordered from the date of discrimination to the date of the decision, minus interim earnings, with interest. Here, the resumes of Anderson, Borkowski, DeSimone, Giarusso, and

Mansmann were received at Lake on November 23, 1994 (CX5), and Barreiro's on December 9, 1994. (CX6). The record does not provide a precise date of discrimination for each individual; accordingly the beginning date of the back pay period will be set at December 1, 1994.

Lake failed to produce complete and accurate wage rate information in discovery. It therefore cannot be heard to complain if the gross back pay is calculated based on the actual wages paid to Jose Hermo because Hermo is the person unlawfully occupying the disputed job. Baker v. Emery Worldwide, 789 F. Supp. 667, 674 (W.D. Pa. 1991). Gross back pay for 1995 and 1996 will therefore be the amount of wages listed on Hermo's W-2 forms for those years. (CX14). The record is inadequate to show Hermo's exact earnings for December 1994, or for 1997. Accordingly I calculate the earnings for 1997 in accordance with the hourly rate Lake set out in CX20 and for December 1994 in accordance with the hourly rate testified to (Tr.424-25) as follows:

1994	$ 2,400.00	($15.00/hour x 40 hours/week x 4 weeks)
1995	$33,133.51	(W2 for 1995, CX14)
1996	$35,276.28	(W2 for 1996, CX14)
1997	$23,680.00	($16.00/hour x 40 hours/week x 37 weeks)
	$94,489.79	

b. Mitigation

The defense of mitigation of damages is an affirmative defense. Accordingly the respondent has the burden to prove by a preponderance of the evidence that complainants failed to mitigate by seeking other work with reasonable diligence. No evidence was presented as to the number of comparable job options available during the period in the relevant labor market, other than Anthony Rosaci's testimony that construction trades were not doing well in New York in 1994. The complainants testified that the usual and customary means of seeking work is to notify the union of their availability and the union then would seek out jobs for them. Each of the complainants testified that he kept in touch with the union in an effort to find work. (Tr.36, 39, 57, 110-11, 132-33, 142, 155, 158, 456-57, 460-62). Lake made no showing that there were suitable positions available for which they could have applied but did not. Cf. Greenway, 951 F. Supp. at 1059-61. Absent such evidence I have no basis for any reduction in the back pay based on failure to mitigate. It is the employer's burden to show both that suitable work existed and that complainants did not make reasonable efforts to obtain it. Dailey v. Societe Generale, 108 F.3d 451, 458 (2d Cir. 1997), Clarke v. Frank, 960 F.2d at 1152. Lake did not sustain this burden.

c. Collateral benefits

Lake introduced evidence showing that Kenneth Mansmann, Isidro Barreiro, and Andrew DeSimone received unemployment compensation for portions of the back pay period (RX7(b)(c) and Tr.144), and that Louis Borkowski has been receiving social security disability insurance benefits since December 1995. (Tr.122, 128). The decision whether to deduct unemployment benefits rests in the

sound discretion of the court. Dailey, at 460. Dailey cited to Hunter v. Allis-Chambers Corp., 797 F.2d 1417, 1429 (7th Cir. 1986), for the proposition that where the court has the discretion to deduct, as between conferring a windfall to the victim of wrongdoing and the wrongdoer, the victim is the logical choice. The Dailey court also relied on the Supreme Court's reasoning in NLRB v. Gullett Gin Co., 340 U.S. 361 (1951) and on the weight of common law authority. Dailey, 108 F.3d at 460. The Court in Gullett Gin had noted the longstanding practice of the NLRB of disallowing deductions for collateral benefits, and the fact that the collateral benefit came from sources other than the employer, noting that:

> Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

Gullett Gin, 340 U.S. at 364. Other courts have similarly held that the refusal to deduct disability benefits from a back pay award is not error. Whatley v. Skaggs Cos., 707 F.2d 1129, 1137 (10th Cir. 1983), cert. denied, 464 U.S. 938 (1983). Cf. Dominguez v. Tom James Co., 113 F.3d 1188, 1191 (11th Cir. 1997) (no significant, relevant differences between Social Security benefits and unemployment benefits insofar as back pay awards are concerned).

Although the Second Circuit has yet to address the issue, two district courts in that circuit recently discussed the question of whether the receipt of social security disability benefits should estop an individual from asserting that he is able to perform the essential functions of a job in actions arising under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (1994) and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et. seq. (1994), respectively. Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277 (S.D.N.Y. 1996) and Simon v. Safelite Glass Corp., 943 F. Supp. 261 (E.D.N.Y. 1996). In each case, the plaintiff 's former employer had moved for summary judgment arguing that the plaintiff should be judicially estopped to represent himself as being able to work because of a prior inconsistent claim of disability made to the Social Security Administration (SSA) for the purpose of obtaining disability insurance benefits. In Simon, the plaintiff had attested under oath to the SSA that he was unable to work because of a visual disability. In Mohamed, the plaintiff had attested only that he was profoundly deaf, and that the employer did not accommodate his disability. The difference between these cases illustrates why decisions about whether to apply judicial estoppel[22] are best made on a case by case basis considering the facts, circumstances, and specific

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[22] Judicial estoppel is a doctrine forbidding a party from advancing contradictory factual positions in separate proceedings. Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir.), cert. denied., 510 U.S. 992 (1993). It is an affirmative defense and ordinarily must be pleaded as such. Because it was not pleaded by complainants, I did not consider whether Lake should be estopped to contradict its own prior assertions made under oath to the Department of Labor by Manuel Tobio in the

(continued...)

attestations made in each case and not by a per se rule. Social Security disability determinations are made based upon the nature and severity of an individual's impairment and the degree to which the impairment prevents the individual from performing his previous work or other jobs existing in substantial numbers in the geographical region. 42 U.S.C. § 1382c(a)(3)(A) (1994). The individual's age, education and work experience may factor into the decision, but the ability or willingness of an employer to accommodate the disability does not.

Although the nature of Borkowski's disability was explored to some degree, the record was not developed with respect to any details about representations made by him or by his treating sources to the Social Security Administration as to what his specific functional limitations were. It was not shown that he had made any prior sworn statement contrary to his testimony that he is able to work. There is accordingly no basis upon which to credit Lake with his collateral benefits or to consider him unavailable for work.

d. Interim Earnings

Lake also introduced evidence of interim earnings by each of the individuals in the form of W-2s (RX7(a)-(e) and RX9), but the W-2 forms do not indicate the time periods during any given year when the employee was working or on layoff. Testimony of the witnesses established that some of the complainants worked for various portions of the back pay period and were unemployed or on layoff during other portions of the period. Except for DeSimone who was not employed, no particularized showing was made as to precisely when each was employed or on layoff. Kenneth Mansmann attended night school until July 1995 and became employed as a teacher in September 1995. He no longer wants to work at Lake. Andrew DeSimone has continued to be unemployed, and is available for work. Guy Giarusso currently works at Empire City, and worked for Colum and Monafacci for part of 1995. Louis Borkowski had only two weeks of employment in 1995 (Tr.112, 120-21), and has been receiving social security disability benefits since December of 1995. He testified, however, that he is able to work and that his doctor believes he is able to work. (Tr.129). Isidro Barreiro has worked for Allied Brothers since December 1996. He worked for Nab from June 1995 until December 1996, with varying periods of layoff. Leonard Anderson is employed at Nab, but was on layoff at the time of the hearing.

Were the gross back pay to be computed based on each discriminatee's actual losses, it would be appropriate to deduct for interim earnings. However the total back pay would considerably exceed the total compensation paid to Hermo, the person occupying the job. Back wages should be recoverable only for one job, not six. Where it cannot be determined who would have been hired, the fairer course is to compute one gross award and divide it among the complainants. Cf. Ingram v. Madison Square Garden Ctr., 709 F.2d 807, 812 (2d Cir.), cert. denied, 464 U.S. 937 (1983). Because such a division results in individual recoveries of approximately six months back pay for each complainant out

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[22](...continued)
application for labor certification for Hermo.

of a back pay period of 34 months, no further reduction is warranted. In view of the fact that one back pay award must be shared among six complainants and because any uncertainties should be resolved against the discriminator, I find that under these circumstances no offset should be made for interim earnings. Cf. Malarkey v. Texaco, Inc., 983 F.2d 1204, 1214 (2d Cir. 1993) (discriminator should not be the beneficiary of uncertainty); EEOC v. Local 638, 674 F. Supp. 91, 103 (S.D.N.Y. 1987) (resolve uncertainties against discriminator).

e. Interest

Prejudgment interest is an element of complete relief in that it compensates a victim for the loss of the value of money over time. It is also intended to prevent an employer from trying to enjoy an interest free loan for as long as it can delay paying out the back wages. Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 145 (2d Cir.), cert. denied, 510 U.S. 1164 (1994). Make whole relief, moreover, can be achieved only if the interest is compounded. Id.

In assessing prejudgment interest, courts have used a variety of rates, including the treasury bill rate ("T-bill rate") as provided in 28 U.S.C. § 1961, McIntosh v. Irving Trust Co., 873 F. Supp. 872, 883-84 (S.D.N.Y. 1995), statutory interest rates, Gelof v. Papinaugh, 1987 WL 18691, at *1 (D. Del. 1987) (using Del. Code Ann. tit. 6, § 2301(a) (Supp. 1986)), market rates, United States v. City and County of San Francisco, 747 F. Supp. 1370-71 (N.D. Cal. 1990) (90% of prime rate), aff'd, 976 F.2d 1536 (9th Cir. 1992), vacated in part on other grounds, 984 F.2d 345 (9th Cir. 1993) and the IRS rate for underpayment of taxes as set forth in 26 U.S.C. § 6621.

Here neither party addressed the issue of the appropriate rate to be applied and I see no reason to depart from the NLRA method of using the adjusted federal rate established by the IRS for underpayment of taxes. Accordingly, prejudgment interest shall therefore be assessed in accordance with the rates set forth in § 6621 of the Internal Revenue Code. 26 U.S.C. § 6621 (1994). Cf. Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 572 F. Supp. 494, 494 (D. Conn. 1983). Post judgment interest shall accrue at the same rate, and is intended to compensate complainants for any delay from the time damages are reduced to an enforceable judgment to the time that Lake pays the judgment. Cf. Andrulonis v. United States, 26 F.3d 1224, 1230 (2d Cir. 1994); Rose v. Ireco, Inc., 872 F. Supp. 1127, 1135 (N.D.N.Y. 1994).

3. Front Pay

There is minimal evidence upon which to predicate an award of front pay. Front pay, moreover, is ordinarily appropriate only in lieu of job placement. See, e.g., Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727 (2d Cir. 1984). It is necessary only so long as the discriminatee must wait for the next available opening. Where, as here, the job is unlawfully held it would be appropriate to require either

immediate consideration for employment or front pay, but not both. Requiring immediate consideration treats the job as being vacant so long as it is unlawfully occupied; requiring front pay as well would result in an impermissible double recovery.

X. FINDINGS, CONCLUSIONS AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, proposed findings of fact, and conclusions of law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and

conclusions of law:

A. Findings

1. Leonard Anderson, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarusso and Kenneth Mansmann are qualified, experienced iron workers.

2. Anderson, Barreiro and Giarusso are naturalized United States citizens and Borkowski, DeSimone, and Mansmann are native-born U.S. citizens.

3. Lake Construction is a New York corporation engaged in general contracting and construction work.

4. Jose Hermo is a licensed welder and an undocumented worker employed by Lake.

5. On or about February 11, 1994, Lake agreed to sponsor Jose Hermo for alien labor certification.

6. Lake had also applied for labor certification on October 13, 1993 for a construction welder (welder-fitter) and on July 25, 1994 for a brownstone worker (stonemason).

7. Lake's Vice-President, Manuel Tobio, executed an application for alien labor certification in February 1994 and signed a letter on Lake stationery in August 1994 describing Lake's business operations in order to help obtain alien labor certification for Jose Hermo.

8. The application for labor certification designated Dulce Cuco, 329 Ferry Street, Newark, N.J. 07105, as Lake's agent for the purpose of obtaining labor certification and stated that Manuel Tobio, for Lake, took responsibility for the accuracy of any representations made by her.

9. The application represented that the job was open to any qualified U.S. worker.

10. The application represented that the people who had applied were illegal or lacked experience or knowledge of how to cut metal.

11. Markings and initials subsequently added to the application on August 15, 1994 and August 26, 1994 were not made by Manuel Tobio.

12. Other documents were subsequently filed with the Department of Labor in connection with the labor certification application which were not signed or reviewed by Manuel Tobio.

13. In November 1994, Anthony Rosaci was notified of a job opening for an ornamental iron worker at Lake Construction, job number MM216, the 30-day recruitment period for which would begin on November 7, 1994.

14. The same job was advertised in the New York Post on November 21, 1994.

15. The notification and the advertisement were both required parts of the alien labor certification process.

16. On November 22, 1994, Rosaci sent resumes to Lake Construction for Leonard Anderson, Louis Borkowski, Andrew DeSimone, Guy Giarusso, Tea Graham and Kenneth Mansmann.

17. Lake knew that qualified U.S. workers were seeking to apply for the job listed in Lake's application for alien labor certification for Hermo.

18. On December 7, 1994, Dulce Cuco called Anthony Rosaci on behalf of Lake and told him that the one of the job requirements was that the applicant speak Spanish or Portuguese.

19. On December 8, 1994 Anthony Rosaci sent resumes to Lake Construction for Isidro Barreiro, who speaks Spanish and Portuguese, and Edson Barbosa, who speaks Brasilian Portuguese.

20. On or about December 13. 1994. Dulce Cuco called Rosaci and arranged job interviews for Barreiro and Barbosa at 329 Ferry Street, Newark, N.J. on December 19, 1994.

21. The office at 329 Ferry Street, Newark, N.J. 07105 is the address of the Capital Agency, a travel agency.

22. Rosaci, Barreiro and Barbosa traveled to New Jersey to the address given and waited there for Lake's representative.

23. Dulce Cuco eventually told them that the representative was not coming due to a workplace accident, but Barreiro and Barbosa filled out job applications.

24. No one ever contacted the complainants or any one of them again about the job at Lake.

25. Lake's application for labor certification for Hermo remained open until it was rejected by the Department of Labor in July, 1995.

26. At different stages during the pendency of the labor certification application, copies of at least five letters from the New York State Department of Labor to Susan DiNicola and Anthony Rosaci were sent to Lake.

27. Lake did not withdraw the application or notify the Department of Labor that it repudiated any acts of Dulce Cuco or Susan DiNicola in furtherance of the application for labor certification.

28. Lake pursued alien labor certification for Hermo despite knowing there were qualified United States citizens available for hire.

29. Dulce Cuco was paid by Jose Hermo.

30. Lake never had any intention of considering candidates other than Jose Hermo for the job.

31. The job complainants were applying for was and is unlawfully occupied by Jose Hermo, an undocumented alien not authorized for employment in the United States.

B. Conclusions

1. A protected individual within the meaning of § 1324b(a)(1)(B) is statutorily defined as a United States citizen or national, an alien lawfully admitted for permanent or temporary residence, a refugee, or an individual granted asylum. 8 U.S.C. § 1324b(a)(3). Leonard Anderson, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarusso and Kenneth Mansmann are protected individuals within the meaning of § 1324b(a)(1)(B).

2. The INA provides for causes of action based on citizenship status against employers of three or more employees. 8 U.S.C. § 1324b(a)(1)(B), (a)(2)(A). Lake Construction is an employer subject to the Act.

3. A B-2 visa (visitor for pleasure) is intended for temporary visits by persons having permanent residence abroad which they do not intend to abandon. 8 U.S.C. § 1101(a)(15)(B). It is available to tourists and social visitors and does not permit employment in the United States. 8 U.S.C. § 1101(a)(15)(B), 8 C.F.R. § 214.1(e). Jose Hermo has never been authorized by law for employment in the United States.

4. It is the statutory duty of the Secretary of Labor to evaluate the current labor market and to determine whether sufficient United States workers are able, willing, qualified, and available, and

whether the employment of aliens will adversely affect the wages and working conditions of United States workers similarly employed.

5. The Department of Labor has adopted regulations requiring employers seeking alien labor certification to conduct systematic recruitment of U.S. workers. 20 C.F.R. § 656.21(f)-(g), (j). The employer is required to make a written report showing recruitment efforts, whether the job was advertised, whether United States workers responded, the number of interviews and lawful job-related reasons for not hiring the United States workers interviewed. 20 C.F.R. § 656.21(b)(1)-(6).

6. All conditions precedent to the institution of this action have been satisfied.

7. The job requirement that an iron worker at Lake Construction must speak Spanish or Portuguese was not justified by business necessity.

8. Lake had no legitimate nondiscriminatory reason for its failure to consider the complainants for employment.

9. Lake discriminated against Leonard Anderson, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarusso and Kenneth Mansmann on the basis of their citizenship in violation of 8 U.S.C. § 1324b by failing to consider their applications for employment and preferring to employ an undocumented alien.

10. Upon a preponderance of the evidence, Lake engaged in an unfair immigration-related employment practice by failing to consider Leonard Anderson, Isidro Barreiro, Louis Borkowski, Andrew DeSimone, Guy Giarusso and Kenneth Mansmann for employment and employing an undocumented alien instead.

11. Lake failed to establish an affirmative defense for its failure to consider the complainants for employment.

To the extent that any statement of material fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth as such.

C. Order

1. Lake shall henceforth cease and desist from the unfair immigration related employment practice found in this case, including, without limiting the generality of the foregoing, hiring illegal aliens in preference to United States citizens and failing to consider United States citizens for employment as metal workers.

2. Lake shall comply with the requirements of 8 U.S.C. § 1324a(b) and shall retain for a period of two years from the date of this final decision and order, the name and address of each individual who applies, in person or in writing, for hire for any position of employment as a construction worker by Lake Construction in the United States.

3. Lake shall give immediate consideration for hire to any complainant applying for work within thirty days of the date of this Order. Applicants may be rejected only for legitimate job-related reasons. The absence of a vacancy will not be a legitimate reason for rejection of an applicant so long as Lake continues to employ undocumented workers.

4. From the date of this order, before any new employee is hired for construction work at Lake, at least ten days written notice of the job opening shall be provided to Anthony Rosaci or his successor at Local 455. Any of the complainants who apply for work at Lake shall be given preference for hire over other applicants and may be rejected only for legitimate, job-related reasons.

5. Within thirty days of the date of this order Lake shall post notices in a conspicuous place at its office and its various job sites advising its employees about their rights under § 1324b and about employer obligations under § 1324a. The notices at the job sites shall be displayed for a period of one hundred and eighty days. The notice at the office shall be displayed for a period of two years.

6. Within thirty days of the date of this order, Lake shall educate its office staff and personnel involved in the hiring process about the requirements of §§ 1324a and 1324b and shall ensure compliance therewith.

7. Lake shall pay to the complainants through their attorneys the sum of $94,489.79 which sum shall be distributed equally among the complainants.

8. Interest shall be calculated in accordance with 26 U.S.C. § 6621 and shall accrue commencing with the last day of each calendar quarter of the back pay period for the amount due and owing for each quarterly period and continuing until full compliance is achieved.

9. Notwithstanding any ancillary proceedings, this is a final decision and order and pursuant to 8 U.S.C. § 1324b(g)(1) it is the final administrative order in this case and shall be final unless appealed in accordance with § 1324b(i).

Complainants will serve upon respondent within thirty days hereafter a proposed schedule setting forth the prejudgment interest calculation. Complainants may file their application for fees and costs on or before October 15, 1997. Respondent may file responsive documents on or before November 15, 1997. Nothing in this order is intended to preclude the parties' resolving the issue of attorneys' fees by agreement.

SO ORDERED.

Dated and entered this 12th day of September, 1997.

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Ellen K. Thomas
Administrative Law Judge

APPEAL INFORMATION

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1997, I have served copies of the foregoing Final Decision and Order on the following persons at the addresses indicated:

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